

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ILLINOIS
3 DR DISTRIBUTORS, LLC,) Docket No. 12 CV 50324
4 Plaintiff-Counterdefendant,)
5 v.) Rockford, Illinois
6 21 CENTURY SMOKING, INC.) Monday, October 28, 2019
7 and BRENT DUKE,) 9:00 o'clock a.m.
8 Defendants-Counterplaintiffs,)
9 CB DISTRIBUTORS, INC. and)
10 CARLOS BENGOA,)
11 Counter-Defendants.)

13 APPEARANCES:

14 For the Plaintiff: NICOLL, DAVIS & SPINELLA LLP
15 (95 Route 17 South,
16 Suite 316,
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17 ROBERT C. von OHLEN & ASSOCIATES
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MR. ROBERT C. von OHLEN, JR.

19 For the Defendants: THE LAW OFFICES OF KEVIN SALAM
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8 For Peter S. Stamatis: WILLIAMS MCCARTHY LLP
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10 MR. JOHN J. HOLEVAS
11 Also Present: MR. SEAN BYRNE
12 MR. FRED CHAPEKIS
MR. THOMAS R. LEAVENS
MS. HEATHER R. LIEBERMAN VAN DYKE
13 MR. TRAVIS W. LIFE
MR. STEVEN S. SHONDER
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25

1 THE CLERK: Calling 12 CV 50324 DR Distributors,
2 LLC v. 21 Century Smoking, Inc.

3 THE COURT: All right. Let's get appearances for the
4 record.

5 MR. von OHLEN: Robert von Ohlen for Plaintiffs.

6 MR. DAVIS: Good morning, your Honor. Anthony Davis
7 on behalf of Plaintiffs, and at our counsel table is one of
8 our colleagues, Brian Moffet, who is here, and also our
9 client, Carlos Bengoa.

10 MR. SALAM: Good morning, your Honor. Kevin Salam.

11 THE COURT: Hold on one second.

12 MR. SALAM: Sorry.

13 THE COURT: All right. Good morning, Mr. Salam.

14 MR. SALAM: Kevin Salam on behalf of Defendants.

15 MR. BISBIKIS: And John Bisbikis, also on behalf of
16 the Defendants.

17 THE COURT: I just saw your appearance, B-i-s-b-i --

18 MR. BISBIKIS: -- k-i-s.

19 THE COURT: Okay. All right.

20 MR. SALAM: Mr. Leonard apologizes, but the case that
21 came up in the law division last week, the judge it was
22 assigned to set the trial for this week, so --

23 THE COURT: Okay.

24 MR. SALAM: -- he will not be here.

25 THE COURT: That's fine.

1 Who is that judge?

2 MR. SALAM: Do you know which case?

3 It is a Law Division case.

4 THE COURT: Yes, they are fun over there.

5 MR. SMITH: Good morning, your Honor. Colin Smith on
6 behalf of the Leavens Strand lawyers, Tom Leavens, Travis
7 Life, Peter Strand, and Heather Liberman Van Dyke.

8 MS. RICH: Good morning, Judge. Trisha Rich on
9 behalf of the Leavens, Strand & Glover lawyers as well.

10 MR. HOLEVAS: Good morning, your Honor. John Holevas
11 on behalf of Mr. Stamatis, who is here in open court.

12 MR. WOLFE: Mark Wolfe on behalf of Mr. Shonder, who
13 is also here.

14 THE COURT: All right.

15 MR. SALAM: And, your Honor, just I forgot to
16 mention, Sean Byrne, one of our consulting experts, is sitting
17 at our table.

18 THE COURT: Got you. Okay.

19 All right. And Mr. Duke is present. I see him
20 there. Okay.

21 All right. Let's do a couple housekeeping matters.

22 Mr. Byrne is here. As I have done in this case and
23 every other case, I over-disclose. Mr. Byrne and I are on
24 at least one committee together. I probably have an
25 un-responded e-mail from him in my inbox somewhere. We are on

1 the Seventh Circuit Council on e-discovery and some other
2 phrase that I can't remember. In the same way I disclosed
3 knowing Ms. Rich and Mr. Smith and have been opposing counsel
4 to Mr. Shonder ten-plus years ago. So I will put that out
5 there. So that takes care of that.

6 I have lots and lots and lots of documents, and I
7 know people are going to want to get a substantial amount of
8 information in the record. Having said that, let's not make
9 Ms. Perkins-Reiva's life -- Heather's life difficult, so keep
10 your cadence less than 120 words per minute.

11 What do you max out at, Heather?

12 THE REPORTER: 260.

13 THE COURT: Okay. Let's not push her red line too
14 much, okay? So there is that.

15 Mr. Holevas filed a motion. I saw sort of an add-on
16 to that by Ms. Rich on witnesses being present. I see
17 Mr. Leavens in the back, Mr. Strand in the back, Mr. Life in
18 the back. All right.

19 MS. RICH: All of our clients are here.

20 THE COURT: I see them all.

21 And somebody way in the back, who is that?

22 All right. We have a visitor from Germany, from
23 Deutschland. So everybody be on your best behavior. He is an
24 IP lawyer. It is an IP case, so he just got lucky. So he is
25 here watching today.

1 And then behind Mr. Shonder, we have?

2 MR. CHAPEKIS: Yes, my name is Fred Chapekis, and I'm
3 here as an observer.

4 THE COURT: Okay. It is public, so not a problem.

5 All right. I have that motion. I didn't see any
6 other -- you guys can sit down.

7 I didn't see any other responses to the motion on the
8 system, all right? Okay.

9 So I think everybody is an interested "party" as the
10 rules and case law interpret it to be, so everybody can be
11 present in court today.

12 All right. So that takes care of the motion.

13 MR. SMITH: Your Honor, just could I clarify? There
14 was also a request of the lawyers for the former counsel to
15 participate, and I'm assuming you're agreeing that we have
16 that right as well.

17 THE COURT: That was -- yes, that was part of the
18 motion, my understanding.

19 MR. SMITH: Right.

20 THE COURT: So, yes, they can participate. We will
21 have to do this in an orderly manner. As I mentioned, it is
22 your guys' motion, it is the Plaintiff's motion, so you will
23 be able to put on your witnesses first and do the directs and
24 those types of things, and then we will figure out what the
25 logical way to address cross/redirect is going to be, okay?

1 All right. So those are some of the preliminary
2 matters.

3 Hold on one second.

4 I'm directing this question initially to
5 Mr. von Ohlen because I think he raised it, and I don't
6 remember in what context. If you didn't raise it, you can
7 correct me if I'm wrong.

8 I know that on the system, it is showing as a jury
9 demand is made, and it went on, and I know in the Defendants'
10 counterclaim, they specifically make a jury demand. So that's
11 in there.

12 Why do I think it might be your position that there
13 isn't going to be a jury in this case? Am I right or wrong on
14 that?

15 MR. DAVIS: I think that's right, your Honor.

16 THE COURT: That there is not going to be a jury?

17 MR. DAVIS: Right, because the nature of the claims
18 under the Lanham Act are equitable, and the defenses are
19 equitable.

20 THE COURT: All right. But aren't there more than
21 just the Lanham Act claims?

22 MR. von OHLEN: There certainly are things, I
23 believe, an Illinois Deceptive Trade Practice Act, and there
24 is -- at least that. There is defamation, which is a state
25 law claim.

1 THE COURT: Right.

2 MR. von OHLEN: So it is a mixed bag, I suppose, of a
3 few state law claims. We don't know what will actually,
4 obviously, reach trial.

5 THE COURT: That's true. Okay.

6 MR. von OHLEN: So whether the state law claims are
7 there or not, I think, is a fair issue at this point.

8 THE COURT: Okay. But then certainly the -- I
9 understand. Thanks for clarifying. Now it makes sense.

10 As a Lanham Act with the equitable claims, that's not
11 a right to a jury trial.

12 Some of these other supplemental state law claims,
13 were they to go to trial, those would seem to be jury issues,
14 unless everybody waives the right to a jury trial.

15 MR. SALAM: We are not waiving a jury trial.

16 THE COURT: Hold on a second. I'm still addressing.

17 MR. SALAM: I'm sorry.

18 MR. von OHLEN: I think that's right, your Honor.

19 THE COURT: All right. Okay. That takes care of
20 that question.

21 I can ask those ones later.

22 I will ask the Defendants this question now: Is it
23 the Defendants' position that Rule 37(e) abrogates all other
24 possible applicable rules relating to sanctions and a court's
25 inherent authority?

1 How is that for a question?

2 MR. SALAM: That's a good question, your Honor.

3 THE COURT: Thanks.

4 MR. SALAM: Well, my position is that based on
5 *Snider v. Danfoss*, your recommendation opinion, as you stated
6 in there, Rule 37 is directly on point -- Rule 37(e) is
7 directly on point with respect to spoliation --

8 And I apologize now for how many times I will
9 mispronounce that.

10 THE COURT: You are not going to be alone.

11 MR. SALAM: Okay.

12 -- spoliation of evidence, okay?

13 Obviously --

14 THE COURT: Of ESI?

15 MR. SALAM: Of ESI. Thank you, your Honor.

16 THE COURT: Not a problem.

17 MR. SALAM: Of ESI. And that would set the issues
18 with respect to a sanctions motion based on Rule 37(e), okay?

19 Obviously, I believe that to the extent there is
20 other discovery violations, okay, in addition to spoliation of
21 ESI, like intentional withholding of documents and some of the
22 other things that Plaintiffs have accused Defendants and the
23 former defense counsel of, that there is certainly -- the
24 court has authority to address that.

25 THE COURT: Okay.

1 MR. SALAM: So is it my position that it is the only
2 basis for which the court can sanction misconduct? No.

3 Is it on point and directly as a statute address it?

4 Yes, I think that would then play into a question of what is
5 allowed under other statute or trying to refer to other
6 sanction statutes when this one is directly on point. I would
7 say that those don't apply.

8 And as to inherent authority, I would suggest that to
9 the extent there is a rule directly on point with respect to
10 spoliation of evidence, your inherent authority would not
11 include doing something different than what is specified or
12 not applying Rule 37(e).

13 THE COURT: Okay.

14 MR. SALAM: That would be our position, your Honor.

15 THE COURT: All right. That is very helpful. I
16 appreciate that.

17 You don't need to answer this question now, but here
18 is a rabbit hole to fall down when we are talking about
19 inherent authority. Rule 37(e) itself, the text itself,
20 doesn't say anything about abrogating the court's inherent
21 authority. It is only referred to.

22 Let me grab some random rule book.

23 In the advisory committee notes, that Rule 37(e)
24 essentially abrogates the court's inherent authority for
25 violations of Rule 37(e) as it relates to ESI, electronically

1 stored information.

2 Something to chew on is can advisory committee notes,
3 not the text of a rule itself, remove a federal court's
4 inherent authority? Interesting question. There is at least
5 one draft law review article floating around out there that I
6 have read.

7 Okay. We don't have to address that now. That's
8 something to think about.

9 I have got that question for later. That question is
10 for later.

11 We will probably talk about that at some point.

12 Okay. I have got Post-its all over the place, but
13 those questions are probably best left for later as the
14 evidence comes out in the hearing.

15 All right. Let's start with the moving party:
16 Anything to address before we start, procedurally,
17 substantively?

18 MR. DAVIS: The only thing we are going to ask
19 procedurally, your Honor, as an initial matter, was to move
20 all of the exhibits from Plaintiff's exhibit list that was
21 submitted to the court and provided to all counsel last
22 Thursday, move those exhibits into evidence and make them part
23 of the evidentiary hearing record at this time.

24 THE COURT: Okay. Any objection?

25 MR. SALAM: I would object, your Honor.

1 THE COURT: Okay.

2 MR. SALAM: I don't have objections on foundation in
3 terms of the documents are what they are, but I will,
4 obviously, reserve the right to object on relevance, hearsay,
5 those things. So I don't have a foundation objection, but I'm
6 not willing to stipulate to admission of those exhibits.

7 THE COURT: Are there any that you will stipulate to
8 the admission of? There are 79 of them.

9 MR. SALAM: Right now, I would have to walk through
10 them. Obviously, docket filings, again, it is foundational.
11 There are things that are in the docket, like the notes of our
12 expert, that may or may not be admissible. But I'm not in a
13 position -- if you want to go through each individual one
14 right now?

15 THE COURT: I don't want to do it now. I thought
16 that would have been something that you would have done before
17 we started today. Okay.

18 MR. SALAM: No, it has not been done, your Honor.

19 THE COURT: Okay.

20 MR. SALAM: I have seen them, but I was going over
21 them with my client, not deciding whether or not we would be
22 objecting.

23 THE COURT: Okay.

24 MR. von OHLEN: Well, could we do it the other way
25 around, that we will assume they are good, unless he wants to

1 object? Because these are all documents that were produced in
2 discovery.

3 THE COURT: Why don't you use what you need to use
4 with the witnesses, and if you want to get them in, ask that
5 they be admitted. There is no jury here. It is presumed that
6 I will consider only relevant information, and I will make the
7 rulings there. If there is an objection, I will note them.
8 And at the end, if there is anything else in the 79 exhibits
9 that you want to get in --

10 MR. von OHLEN: We will just move it at the end.

11 THE COURT: -- move it at the end.

12 MR. von OHLEN: Okay. Thank you.

13 THE COURT: Mr. Davis, anything else procedurally?

14 MR. DAVIS: No.

15 THE COURT: Mr. von Ohlen?

16 MR. von OHLEN: No.

17 THE COURT: Mr. Salam, anything procedurally or
18 substantively you want to address now? Obviously, I have read
19 everything.

20 MR. SALAM: Obviously, privilege is going to be an
21 issue here. I can wait until they ask it. I assume
22 Plaintiff's counsel intends on asking questions about
23 conversations between Mr. Duke and his former defense counsel;
24 am I correct?

25 MR. DAVIS: Yes, consistent with the e-mails that

1 have been produced between -- disclosing communications and
2 other communications, we will.

3 THE COURT: Well, we will see how those shake out as
4 they come through. I can't rule on those in a motion.

5 MR. DAVIS: Correct, your Honor.

6 THE COURT: Anything else, Mr. Salam?

7 MR. SALAM: No, not at this time, your Honor.

8 THE COURT: Okay. Mr. Smith, Ms. Rich?

9 MR. SMITH: One issue, your Honor. As we indicated,
10 Mr. Peter Strand is here. I'm sort of following up on your
11 comments at the last hearing, relating to the hearing before
12 that --

13 THE COURT: And you weren't here, but as I mentioned,
14 as soon as I walked off the bench, I turned to Patrick and
15 went, "Oh, I messed up," because you said Mr. Strand, and I
16 don't know why in my head I'm thinking Mr. Leavens, and I know
17 there is all kinds of things he is involved in, and I went "I
18 don't know why I was thinking of Mr. Strand -- Mr. Leavens,
19 when he specifically said Mr. Strand." So I didn't
20 know -- and I haven't seen his name on a piece of paper or
21 anything.

22 MR. SMITH: Well, I will just -- let me comment
23 briefly, which is that Mr. Strand was not involved in the
24 document production issues in this case.

25 THE COURT: Okay.

1 MR. SMITH: He filed an appearance basically to be
2 able to stand in for Mr. Leavens if that ever became
3 necessary, and he ultimately billed, over five years, less
4 than eight hours to the case.

5 I have serious doubt that any party will attempt to
6 put him on the stand in this hearing, and I don't know how
7 counsel feel about it. You know, I would like to ask your
8 permission for him to be excused so he doesn't need to sit
9 through all this hearing that he has very little to add to,
10 and, in fact, nothing to add to, whether that decision can be
11 made now or whether it has to be made later today, but I
12 really think he is spinning his wheels being here, your Honor.

13 THE COURT: Okay. I only have what I have in front
14 of me.

15 MR. SMITH: I understand.

16 THE COURT: And now it is voluminous. We have a lot
17 of dead trees in front of me, and I have tried to shepherd
18 this case since 2013, clearly unsuccessfully, and Mr. Strand's
19 name never came up except in this context. So I don't know
20 what people's views are. I don't know what communications
21 have occurred with current counsel or prior counsel. I just
22 don't know. So I would like to kind of see how it shakes out,
23 but from what I have seen, he is not involved.

24 Go ahead, Mr. Salam.

25 MR. SALAM: Your Honor, I spoke with my client. He

1 does not recognize Mr. Strand. He has had no communications
2 with Mr. Strand. So I have no objection to him not being
3 required to be present.

4 THE COURT: Okay.

5 MR. SALAM: If somehow it becomes -- if on our side,
6 if somehow it seems like we would need him, which I don't
7 expect, we could always plug him in on the extra two and a
8 half hours, but I have no problems with him being excused.

9 THE COURT: Okay. Any involvement with Mr. Strand?

10 MR. von OHLEN: I think it is up to him. I mean, we
11 don't know what his involvement is. Those are representations
12 that may be true, but if the answer is, "Yeah, my eight hours
13 involved telling him what to preserve," that's an important
14 question.

15 THE COURT: Okay. I assume it was more substantive.

16 MR. von OHLEN: I don't know, so I can't say, "Send
17 him home."

18 MR. SMITH: Your Honor, obviously, we could let him
19 go today, and if something pops up today, he could come back
20 on Wednesday, but I highly doubt anything is going to come up
21 based upon what we know about his involvement.

22 THE COURT: Okay. Mr. Strand, why don't you step up
23 for a moment.

24 MR. STRAND: Good morning, your Honor.

25 THE COURT: Good morning, Mr. Strand.

1 I know you were in the back of the courtroom and you
2 heard the statements made by counsel in this case, and you
3 heard my statements as well. I know you -- my recollection is
4 you have never stepped up in this case and appeared in court
5 in this case in any way, and I can't remember you filing
6 anything relating to the substance of the case; is that right?

7 MR. STRAND: That's all correct. I didn't file
8 anything other than my appearance at the beginning of the
9 case.

10 THE COURT: Okay. I will let you leave with the
11 stipulation that if we do need you on Wednesday, you will come
12 back on Wednesday.

13 MR. STRAND: I would be pleased to come back on
14 Wednesday.

15 THE COURT: All right. And that's a voluntary
16 decision on your part. So if there is something that's said
17 here that you could have been present to observe, watch, hear,
18 that's your choice, okay?

19 MR. STRAND: I understand. Thank you, your Honor.

20 THE COURT: Okay. All right. I will excuse
21 Mr. Strand.

22 MR. SMITH: Thank you, your Honor.

23 One other very minor housekeeping matter: After
24 seeing the other parties' exhibits and receiving additional
25 exhibits up until last night, we identified a couple more

1 exhibits that I have provided to the Plaintiffs and the
2 Defendants. I haven't at this moment got punched copies for
3 you, your Honor. I have copies that we can give you during a
4 break, or we can figure out how we can give you as we move
5 along, but I just wanted to indicate that while they were more
6 in the nature of rebuttal exhibits, we decided to go ahead and
7 disclose them to avoid any issues.

8 THE COURT: All right. So currently you are at 15?

9 MR. SMITH: Yes.

10 THE COURT: So whatever you are going to do, mark
11 them sequentially after that.

12 MR. SMITH: Right. It will be 16 and 17, your Honor.

13 THE COURT: All right. Does everybody else have
14 those?

15 MR. SMITH: I haven't given them to Mr. Holevas yet,
16 but --

17 THE COURT: Mr. Holevas has it.

18 Mr. Salam?

19 MR. SALAM: Yes, I do, your Honor.

20 And similarly, in the course of preparing over the
21 weekend, I did send, I think, several other exhibits, which I
22 have numbered. I have not yet -- in fact, I have the court's
23 binder with me. I did not previously send the court a binder
24 of our exhibits.

25 THE COURT: What are these, then?

1 MR. SALAM: Well --

2 THE COURT: For the record, I'm showing two big
3 stacks of documents.

4 MR. SALAM: Yes, the exhibits are the exhibits that I
5 initially -- the exhibit list is, in fact, the same, but I
6 have a new binder of exhibits for the hearing.

7 THE COURT: Additional?

8 MR. SALAM: They currently are identical to what was
9 previously provided.

10 THE COURT: So they are just in a different format?

11 MR. SALAM: Excuse me?

12 THE COURT: They are just in a different format?

13 MR. SALAM: They are in a three-ring binder.

14 THE COURT: Instead of the spiral bound?

15 MR. SALAM: Correct, your Honor. And I will hand
16 that up to the court just in case there is some -- you know, I
17 don't believe there is any difference.

18 THE COURT: Okay. So I have got you going up to
19 Exhibit 52. Are there any beyond 52?

20 MR. SALAM: I did, over the weekend, offer up a few
21 more to counsel.

22 THE COURT: What is a "few"?

23 MR. SALAM: I think it was three, and they were
24 numbered 53, 54, and 57.

25 MR. von OHLEN: 57.

1 MR. SALAM: I will hand those up to you, your Honor.

2 THE COURT: Okay. And, Mr. von Ohlen and Mr. Davis,
3 do you have copies of those documents?

4 MR. DAVIS: Yes, we received e-mails over the
5 weekend, your Honor.

6 THE COURT: Okay. All right. We will get to them
7 when we get to them, then.

8 MR. SALAM: Okay, your Honor. Thank you.

9 THE COURT: I think I left off with Mr. Salam.
10 Anything procedurally or substantively to add?

11 MR. SALAM: That was it, your Honor.

12 THE COURT: Ms. Rich, anything?

13 MS. RICH: Nothing more from us.

14 THE COURT: Mr. Holevas?

15 MR. HOLEVAS: Not at this point, your Honor. Thank
16 you.

17 THE COURT: All right. Go ahead. Call the first
18 witness.

19 MR. DAVIS: Plaintiff's call Brent Duke as our first
20 witness as part of this evidentiary hearing.

21 MR. SALAM: Your Honor, may I address the court? One
22 more thing.

23 THE COURT: Sure.

24 MR. SALAM: It is related to Mr. Duke.

25 THE COURT: Okay.

1 MR. SALAM: I just wanted to inform you Mr. Duke's
2 glasses broke this morning. So if he is fumbling with his
3 glasses, I just wanted to make people aware of that.

4 THE COURT: Do you need any cheaters? I have got
5 them all over the place if you need to read.

6 THE WITNESS: They're not for reading.

7 THE COURT: Okay.

8 MR. SALAM: Thank you, your Honor.

9 (Witness duly sworn.)

10 THE COURT: Whenever you are ready.

11 MR. DAVIS: Thank you, your Honor.

12 BRENT S. DUKE, PLAINTIFF'S WITNESS, SWORN (Adversely)

13 DIRECT EXAMINATION

14 BY MR. DAVIS:

15 Q. Good morning, Mr. Duke.

16 A. Good morning.

17 Q. As a reminder, my name is Anthony Davis, and I'm the
18 attorney for the Plaintiffs in this case.

19 Do you recall that?

20 A. Yes.

21 Q. And I was the attorney that took your deposition during
22 three days in June of 2015; do you recall that?

23 A. Yes.

24 Q. And prior to this hearing today, you had an opportunity to
25 meet and prepare with your new attorneys in this case; is that

1 right?

2 A. Yes.

3 Q. And that your new attorneys are Mr. Kevin Salam?

4 A. Yes.

5 Q. And Mr. Leonard?

6 A. Yes.

7 Q. And there is a new attorney also here, and what is his
8 name?

9 A. I don't know how to say his last name or pronounce his
10 last name.

11 Q. And you are and have been the sole owner, officer, and
12 director of a company called 21 Century Smoking, Inc., at all
13 times, right?

14 A. Yes.

15 Q. And you're named individually also in this lawsuit; is
16 that right?

17 A. Yes.

18 Q. And your company, 21 Century Smoking, Inc., is also named
19 as a Defendant, right?

20 A. Correct.

21 Q. And do you recall that your company was sued in the fall
22 of 2012 by my client, DR Distributors, LLC?

23 Do you recall that?

24 A. Yes.

25 Q. And how did you learn about the lawsuit?

1 A. I received an e-mail from a random lawyer that was -- I
2 don't know how you would even describe it. "Ambulance chaser"
3 I guess would be the description. He was e-mailing me and
4 trying to basically get my business, and that's how I
5 discovered there was a lawsuit.

6 Q. And that e-mail was sent to what e-mail account of yours?

7 A. I believe support@21centurysmoking.com.

8 Q. Do you remember the name of that attorney?

9 A. I do not.

10 Q. And who were the first attorneys that you hired to provide
11 you with legal guidance regarding this lawsuit?

12 A. Can you clarify, like, the time frame on that?

13 Q. Yes.

14 After you first learned of the lawsuit, do you know
15 the date when you received that e-mail?

16 A. I do not.

17 Q. Do you recall the time period generally?

18 A. 2012. May 2012.

19 Q. And that was the first time you received notice of the
20 lawsuit, right?

21 A. Yes.

22 Q. Okay. I'm saying who were the first attorneys, meaning
23 after you received that e-mail and first learned about the
24 lawsuit, who were the first attorneys that you spoke to or
25 sought guidance from in relation to the lawsuit?

1 A. That I hired or that I spoke to?

2 Q. Well, let's take it in pieces.

3 Who are the first attorneys you spoke to?

4 A. I spoke to Matt Rieger.

5 Q. Okay. And --

6 THE COURT: Can we get a spelling of "Rieger," if you
7 know?

8 THE WITNESS: It is either R-i-e-g-e-r or
9 R-e-i-g-e-r. It is one of the two.

10 THE COURT: Okay. All right.

11 BY MR. DAVIS:

12 Q. And in your mind, there is a difference between when you
13 are communicating with someone between e-mails and speaking,
14 right?

15 A. Can be, yes.

16 Q. Can be?

17 A. Yes.

18 Q. So if you testify that you are speaking to someone, it
19 could be that you are not actually orally talking to them like
20 on a phone, but you could be communicating with them
21 electronically in some way?

22 A. I guess, potentially, it could be.

23 Q. And when you say "potentially," give me an example of
24 that.

25 A. I'm saying if I said that, I guess potentially I could be

1 meaning e-mailing if I said I spoke to someone. I don't
2 recall if I spoke to Matt Rieger or if I e-mailed Matt Rieger.
3 I don't remember exactly how I communicated with him.

4 Q. I'm asking because you asked me to clarify my question.
5 You said, "Did I speak to him or e-mail him," if I understand
6 your testimony. I'm trying to understand the distinction in
7 your mind.

8 A. I guess I didn't -- I don't even remember asking that. I
9 did speak to him. I did call him, I believe, Matt Rieger.

10 Q. And when you spoke to Matt Rieger, is that on a phone?

11 A. I believe so, yes.

12 Q. And did you also e-mail him?

13 A. I don't recall e-mailing him.

14 Q. Did you ever give him a copy of the lawsuit?

15 A. No.

16 Q. And how did he know about the lawsuit, if you didn't give
17 him a copy of the complaint?

18 A. Because I called him. After I found out about the
19 lawsuit, I called him.

20 Q. And why did you call Matt Rieger?

21 A. Because he was the initial counsel that I had hired
22 regarding this case --

23 Q. And that was --

24 A. -- regarding this trademark issue in general.

25 Q. Okay. And after you spoke --

1 THE COURT: Can I pause you right there?

2 So did he work on your trademark matter before the
3 lawsuit?

4 THE WITNESS: Exactly.

5 THE COURT: That's all I wanted to know.

6 Okay. Go ahead.

7 BY MR. DAVIS:

8 Q. And did Mr. Rieger -- what did Mr. Rieger tell you about
9 the lawsuit or what to do in response to the lawsuit.

10 A. He was no longer operating his business. He was working
11 for another company at that point. So he said that I needed
12 to go find counsel, and he recommended the law firm where Tom
13 Leavens worked.

14 Q. And what's the name of that law firm?

15 A. Leavens, Strand & Glover was the name of the law firm.

16 Q. All right. And that's the firm where Mr. Tom Leavens
17 works --

18 A. Yes.

19 Q. -- or worked.

20 And you also saw a few minutes ago Mr. Peter Strand.

21 He was an attorney at that firm also, right?

22 A. Yes.

23 Q. And was that the only other -- after speaking to
24 Mr. Rieger, is that the only other law firm that you spoke to
25 about representing you and your company in this lawsuit?

1 MR. SALAM: Objection; foundation, your Honor.

2 THE COURT: It is a foundational question.

3 Overruled.

4 THE WITNESS: Yes.

5 BY MR. DAVIS:

6 Q. And Leavens and Strand, the two, did you meet with

7 Mr. Leavens and Mr. Strand at their offices?

8 A. No.

9 Q. Did you speak with them over the phone?

10 A. No.

11 Q. Okay. How did you first communicate with the attorneys at
12 the Leavens, Strand & Glover firm?

13 A. I have never spoken with Strand.

14 Q. Never?

15 A. No.

16 Q. That's part of my questioning. We are trying to
17 understand.

18 Now, Mr. Strand and Mr. Leavens signed your answer
19 and your first counterclaim that was filed in this case. You
20 understand that, right?

21 A. I believe that to be true, yes.

22 Q. Right.

23 They are listed as your attorneys on the answer and
24 the counterclaim that your company filed against my client in
25 this case, right?

1 A. I believe so.

2 Q. Okay. I'm trying to understand. You heard Mr. Strand and
3 his attorneys before saying he had no involvement in the case,
4 yet he signed the first pleading you filed -- or he's listed,
5 I should say. Mr. Leavens signed it. Mr. Strand is listed
6 right under him.

7 MR. SMITH: Objection. Objection, your Honor.

8 THE COURT: Wait. Stop. Stop.

9 Let the question be answered, then object, and then I
10 will rule. We don't have a jury here that will be tainted by
11 the question coming out in any way.

12 MR. SALAM: Thank you.

13 THE COURT: So finish the question, then make your
14 objection, then I will rule.

15 Go ahead. Restate your question. Make Heather's
16 life easier.

17 MR. DAVIS: Thank you, your Honor.

18 BY MR. DAVIS:

19 Q. Your initial answer and counterclaim filed in this case
20 was signed by Mr. Leavens, and Mr. Strand is listed right
21 under his name in that pleading.

22 Do you know what his involvement was in representing
23 you and your company in filing that pleading?

24 A. I do not.

25 Q. And is it your testimony that you never met with

1 Mr. Strand?

2 A. Yes.

3 Q. And you never spoke to him?

4 A. Yes.

5 Q. Ever?

6 A. Not that I can recall.

7 Q. And did you ever e-mail with him?

8 A. No.

9 Q. Okay. Were you ever aware that he was working on your
10 case internally at the Leavens Strand firm?

11 A. No one ever discussed it with me.

12 Q. Okay. And the Leavens Strand attorneys are the ones that
13 are here in court today, right?

14 A. Yes.

15 Q. Okay. And you are the person that authorized your
16 attorneys to file the counterclaim in this case, right?

17 A. Yes.

18 Q. Okay. Now, you testified that you had previously
19 consulted with and hired an attorney named Matt Rieger; is
20 that right?

21 A. Yes.

22 Q. And that was in 2011?

23 A. That was in 2010.

24 Q. 2010.

25 And in 2011, isn't it true, you were e-mailing and

1 communicating with him about filing a lawsuit against my
2 client?

3 A. Yes.

4 Q. And isn't it correct that he was actually drafting a
5 complaint to be filed in court against my client on your
6 behalf?

7 A. I believe so, yes.

8 Q. And that was in 2011?

9 A. I don't know the time frame of that.

10 Q. And to find the time frame out, we would simply have to
11 look at e-mails, right, and that would refresh your
12 recollection as to the date of those communications?

13 A. Yes.

14 Q. And Mr. Rieger would have been e-mailing you using what
15 e-mail account of yours?

16 A. He could have been using bduke@21centurysmoking.com,
17 support@21centurysmoking.com, or brentduke@yahoo.com.

18 Q. So your testimony before was that Mr. Rieger said, "I
19 don't do that kind of work" or "I closed my business."

20 What time frame did he tell you that?

21 A. That was late 2012, after the filing.

22 Q. And that's after he had already started drafting and
23 preparing a complaint on your behalf; isn't that right?

24 A. I don't understand what you are asking.

25 Q. You just testified that in 2011, your attorney Mr. Rieger

1 was drafting and preparing a complaint to be filed against my
2 client; isn't that right?

3 A. Yes.

4 Q. And then you further testified that in 2012, he told you,
5 "I no longer do this work," and referred you to the Leavens
6 Strand firm; is that right?

7 A. Yes.

8 Q. But prior to him telling you that, he was working for you
9 as your attorney, preparing a lawsuit against my client,
10 right?

11 A. Yes.

12 Q. Okay. And Mr. Rieger, in fact, drafted a complaint for
13 your review and forwarded it to you in 2011, correct?

14 A. Again, I don't know if that was in 2010 or 2011 or earlier
15 in 2012. I don't know the year in which that was sent to me.

16 Q. I will represent to you --

17 MR. DAVIS: And I will mark for identification
18 purposes Plaintiff's Exhibit 80.

19 And I will hand a copy to counsel. You guys can all
20 share that.

21 Your Honor, for identification purposes, and I will
22 hand one up to your Honor, I have handwritten on it "P-EX 80"
23 for Plaintiff's Exhibit 80.

24 THE COURT: All right.

25 MR. DAVIS: May I approach, your Honor?

1 THE COURT: Sure.

2 And, Mr. Salam, do you have a copy?

3 MR. SALAM: I do, your Honor.

4 THE COURT: All right. Ms. Rich, Mr. Smith, do you
5 have copies?

6 MR. SMITH: We will share.

7 THE COURT: All right. Okay. You can approach, if
8 you want to.

9 MR. DAVIS: Your Honor, what I have marked is the
10 privilege log of 21 Century Smoking, Inc.

11 Your Honor, I stand corrected by my colleague. It is
12 already in our exhibit list. Sorry about that. Exhibit 54.

13 THE COURT: All right.

14 MR. DAVIS: Plaintiff's Exhibit 54.

15 THE COURT: 54. Hold on one second.

16 Go ahead. The document is the document. Go ahead.

17 BY MR. DAVIS:

18 Q. Mr. Duke, do you recall your attorneys creating a
19 privilege log in this case for documents that they withheld
20 from production?

21 A. I don't know what you are talking about, no.

22 Q. Is that the first time today you have ever heard those
23 words, "privilege log"?

24 A. I have heard the words, but I don't know what you are
25 talking about right now.

1 Q. Independent of my question, prior to today, you have no
2 recollection of ever hearing or dealing with a privilege log
3 in this case?

4 A. No.

5 Q. And did your attorneys at any time ever tell you in this
6 case they were withholding certain documents from production
7 based on the attorney-client privilege or other privilege?

8 A. Yes.

9 Q. And tell me about the first time you had that conversation
10 with them.

11 A. I remember during my deposition it was discussed, the
12 attorney-client privilege matter.

13 Q. And isn't it true that you had provided to your attorneys
14 correspondence between you and your attorney Mr. Rieger that
15 included e-mails and copies of a draft complaint that was
16 going to be filed against my client in this case?

17 A. I believe I did, yes.

18 Q. And as you sit here today, you are unaware whether or not
19 your attorneys ever produced those to Plaintiffs or withheld
20 them in this case?

21 A. I don't know.

22 Q. Do you recall on September 29th, 2011, receiving a
23 communication from Matt Rieger to you with a draft of the
24 complaint for your review?

25 Do you recall that?

1 A. I don't recall.

2 Q. But that's something that happened, right?

3 A. If you have an e-mail sitting there, then, yes, it
4 happened. I don't recall it happening. I believe you that it
5 happened. I do not recall the actual date.

6 Q. So is your confusion about the date of the communication
7 or whether the communication actually happened?

8 A. The date.

9 Q. The date?

10 A. Yes.

11 Q. So just to be clear on your testimony, you recall it
12 occurring, receiving a draft complaint from your attorney Matt
13 Rieger, right?

14 A. Yes.

15 Q. And you recall signing an agreement with him for legal
16 services in November of 2010?

17 A. Yes.

18 Q. And that was related to the lawsuit, or was that for
19 trademark services?

20 A. That was -- well, there was no lawsuit yet. That was
21 based on the fact someone was using my name, and I was trying
22 to get them to stop.

23 THE COURT: And when you say your name, do you mean
24 your name, Brent Duke, or are we talking 21 Century Smoking?

25 THE WITNESS: 21 Century Smoking. Confusion was

1 starting to occur. I needed someone to try to help me get it
2 to stop.

3 THE COURT: Okay. Thank you.

4 BY MR. DAVIS:

5 Q. And as you sit here today, is it your testimony that your
6 attorneys -- or I will say your prior attorneys, the ones that
7 withdrew from the case, Mr. Leavens, Mr. Strand, Ms. Liberman,
8 Mr. Life, Mr. Stamatis, Mr. Shonder, at no time did they ever
9 provide you with a copy of a document called a "Privilege Log
10 of 21 Century Smoking, Inc."?

11 A. I don't recall.

12 MR. DAVIS: I would ask the witness be shown
13 Exhibit 54.

14 THE COURT: Sure.

15 BY MR. DAVIS:

16 Q. The way it is going to work today, Mr. Duke, my colleague
17 behind me here, Mr. Moffet, has a computer with the electronic
18 documents, and when I ask him to bring it up, it is going to
19 come up on the computer screen in front of you.

20 Do you understand that?

21 A. Okay.

22 THE COURT: Is it showing?

23 MR. DAVIS: Yes.

24 BY MR. DAVIS:

25 Q. You can see it?

1 A. Yes.

2 Q. Exhibit 54, have you ever seen this document before?

3 A. Possibly in preparation for this hearing, but I don't
4 recognize it otherwise.

5 Q. Do you see on the right side of the document, it says
6 "case" and the case number and a document number?

7 A. Yes.

8 Q. It means it was filed with the court, right?

9 Do you understand that?

10 A. Yes.

11 Q. All right. And at the top, it says the name of the case,
12 right?

13 A. Yes.

14 Q. And it says "Privilege Log of 21 Century Smoking, Inc.,
15 dated June 6, 2018."

16 Do you understand that?

17 A. Yes.

18 Q. And I'm going to direct your attention to the third page
19 of this document.

20 Do you see on the left side, the first column?

21 What do those numbers mean to you, those
22 designations? Do they mean anything?

23 A. I believe it is the documents that have been produced by
24 21 Century Smoking.

25 Q. All right. Or at least that's a number that identifies

1 documents from you, right?

2 A. Right, yes, that sounds right.

3 Q. Okay. And then the next column are dates?

4 A. Okay.

5 Q. And the next column is a description of the type of
6 document?

7 A. Okay.

8 Q. And, again, you have never seen this before?

9 A. It does not look familiar to me, no.

10 Q. And none of your prior attorneys that I listed before
11 reviewed this with you for accuracy?

12 A. I don't recall ever seeing this document.

13 Q. And the next column over has words in it that have names.

14 Does that mean anything to you?

15 A. I mean, I see names of my lawyers and myself -- or my
16 previous lawyers and myself.

17 Q. Okay. And you didn't help and assist in putting any of
18 these words in this document, right?

19 A. I don't think so.

20 Q. Okay. And the next column is a description. Do you see
21 that?

22 A. Yes.

23 Q. Does that mean anything to you?

24 A. It seems to be a description of whatever the documents
25 are.

1 Q. All right. And I'm going to ask you to look at the
2 seventh entry down. Do you see that one? It is dated
3 9/29/2011.

4 THE COURT: You can identify it. You can touch the
5 screen. These are all touchscreens. So when you touch that
6 screen, it will show up on his screen.

7 BY MR. DAVIS:

8 Q. Do you see -- I'm touching the screen now on mine.

9 Does that show up on your screen?

10 THE COURT: Is it showing?

11 Do what you need to do. We can play with it later.

12 But they are touchscreens.

13 THE WITNESS: Do I touch mine?

14 THE COURT: No. You can, but let him do it.

15 We will take care of it at break.

16 BY MR. DAVIS:

17 Q. Do you see the entry that is dated 9/29/2011?

18 A. Yes.

19 Q. And it says it is a document next to that, right?

20 A. Yes.

21 Q. And what does the next column say?

22 A. "Matthew Rieger, Esq., Brent Duke."

23 Q. And the next column?

24 A. "Draft of complaint for Brent Duke's review."

25 Q. Does that refresh your recollection as to you receiving an

1 e-mail from Mr. Rieger with a draft complaint for your review?

2 A. If it is in here, yes, that sounds right.

3 Q. And you don't dispute that entry in any way?

4 A. I have no reason to, no.

5 MR. DAVIS: Okay. Your Honor, with that basic
6 foundation, we ask to move this entire document into evidence.

7 THE COURT: Any objection?

8 MR. SALAM: Your Honor, I will stipulate that that
9 is, in fact, the privilege log that was filed in this case. I
10 won't stipulate that Mr. Duke in any way has seen it prior to
11 preparation for this, which was his testimony.

12 THE COURT: That has been his clear testimony that he
13 did not prepare the document.

14 MR. SALAM: I have no objection to the admission of
15 Exhibit 54.

16 THE COURT: All right. 54 will be admitted.

17 (Plaintiff's Exhibit 54 was offered and received in
18 evidence.)

19 BY MR. DAVIS:

20 Q. Now, you also -- you testified that you spoke to
21 Mr. Rieger, and the next attorneys you spoke to were who, the
22 Leavens Strand firm; is that right?

23 A. Yes.

24 Q. And who is Zeno Baucus?

25 A. My friend.

1 Q. And is your friend an attorney?

2 THE COURT: Can we have the spelling of --

3 THE WITNESS: B-a-u-c-u-s.

4 MR. DAVIS: Zeno; Z-e-n-o, B-a-u-c-u-s.

5 THE COURT: All right. You said he was a friend of
6 yours?

7 THE WITNESS: Yes.

8 THE COURT: Okay.

9 THE WITNESS: He is an attorney as well.

10 THE COURT: Also an attorney. Okay.

11 THE WITNESS: I believe now he is like a federal
12 prosecutor or something.

13 THE COURT: Okay. Thank you.

14 BY MR. DAVIS:

15 Q. And did you consult with him regarding an infringement
16 lawsuit in 2012?

17 A. Yes, my friend, I definitely consulted with him. He's an
18 attorney, or he was an attorney at that time.

19 Q. In 2012, was Zeno Baucus an attorney?

20 A. Yes.

21 Q. And did you consult with him by e-mail or phone regarding
22 this lawsuit?

23 A. I don't recall if it was this lawsuit, before or after the
24 lawsuit was filed. So I don't recall if I consulted with him
25 about looking for attorneys or if I consulted with him after

1 the lawsuit was filed. I don't recall.

2 Q. And were you consulting with him as your friend or as an
3 attorney?

4 A. My friend.

5 Q. As your friend.

6 So he wasn't retained in any way as your legal
7 counsel?

8 A. No.

9 Q. Okay. And I will ask you to take a look at Page 8 of this
10 document.

11 MR. DAVIS: I will ask you to go one more -- no,
12 that's it.

13 BY MR. DAVIS:

14 Q. I will ask you to take a look at that.

15 Do you see that page in front of you now?

16 It is listed as still part of Exhibit 54, Docket
17 Entry 294-2. It was filed on 3/25/2019.

18 Do you see at the top there, the second entry, the
19 third entry, the fourth entry, the fifth, the sixth? Do you
20 see all those entries?

21 A. Yes.

22 Q. All right. Does that refresh your recollection that
23 you're e-mailing with someone named Zeno Baucus about this
24 case?

25 A. That's not about this case.

1 Q. All right. And that's my question.

2 What is it about? What says "infringement lawsuit,"
3 what is that about?

4 A. Well, 4/30/12 says "correspondence regarding patent
5 application."

6 Q. Okay. I see that.

7 A. That's why I was speaking with his firm, and I did hire
8 someone from his firm to do a patent application.

9 Q. Okay. All right. And if you look at the third line, the
10 next entry down, the third document, is a May 9, 2012, e-mail.
11 Do you see it says "Zeno Baucus, Esq., Brent Duke"?

12 A. Yes.

13 Q. All right. "Correspondence regarding infringement
14 lawsuit." That doesn't say "patent," right?

15 A. No.

16 Q. And on the far right, it has the initials "AC."
17 Do you see that?

18 A. Yes.

19 Q. I can represent to you that your attorneys have
20 represented to us that means you have withheld that document
21 based on the attorney-client privilege.

22 Do you have any understanding of that?

23 A. I do not. I would have to see the e-mail to know.

24 Q. You would have to -- what would you need to see to know
25 whether or not Zeno Baucus was your lawyer on May 9th of 2012,

1 anything?

2 A. Because I retained his firm for the patent work.

3 Q. Right.

4 A. So I don't know if that was included. I don't know if it
5 was a reply to part of that e-mail. I have no idea what else
6 would be in the e-mail.

7 Q. I'm trying to understand your testimony a few moments ago.
8 You said that you consulted Mr. Baucus as your friend and not
9 your attorney.

10 So can I ask you, which is it, was Mr. Baucus your
11 attorney or your friend at this time?

12 THE COURT: With regard to?

13 MR. DAVIS: With regard to correspondence regarding
14 the infringement lawsuit listed on your privilege log dated
15 May 9th, 2012.

16 THE COURT: All right. Hold on one second.

17 Go ahead.

18 MR. SALAM: My objection is foundation because the
19 witness has said he hasn't seen that correspondence.

20 THE COURT: Okay.

21 MR. SALAM: I understand they don't have it because
22 it has been withheld.

23 THE WITNESS: I mean, if you would like me to --

24 THE COURT: Hold on one second. Overruled.

25 Why don't you read back that question, unless you

1 remember it.

2 Do you want it read back?

3 THE WITNESS: I can answer this to the best of my
4 ability.

5 THE COURT: Okay. Go ahead.

6 THE WITNESS: At some point, Matthew Rieger, his
7 firm, went out of business, and he began working for someone
8 else. So I started consulting with people to attempt to find
9 attorneys in order to eventually file the lawsuit against your
10 client. So I may have reached out to Zeno Baucus regarding
11 that in terms of his firm representing me in this case. So he
12 is a friend, but I would reach out to his firm in order to get
13 them to try to represent me in this case. So it could very
14 well be privileged.

15 BY MR. DAVIS:

16 Q. And did you ever hire his firm outside -- outside of the
17 patent work, did you ever hire Mr. Baucus's firm to represent
18 you in this case?

19 A. No.

20 Q. Did you ever hire them in any way to represent you or give
21 you advice in, as you said, bringing a lawsuit against our
22 client?

23 A. No.

24 Q. And how would the documents that are listed here, the 2012
25 e-mails -- you are looking at me, but can you look at the

1 document?

2 A. Uh-huh.

3 Q. Do you see all the e-mails that are listed there
4 between -- in April 30, 2012; May 9th, 2012; May 14th, 2012,
5 and all the way down to the second to last one --

6 A. Yes.

7 Q. -- 5/23/2012.

8 How would your attorneys in this case, your prior
9 attorneys, the Leavens firm, how did they get these e-mails?

10 A. I don't know how they got these e-mails. I must have
11 given them to them.

12 Q. And if you didn't give them to them, is there someone else
13 that could have given them to your attorneys, your prior
14 attorneys?

15 A. No, it must have been me that gave them to them.

16 Q. So you talked to Mr. Rieger in 2011, is that right, about
17 filing a lawsuit against my client?

18 A. 2010.

19 Q. Sorry. Thank you.

20 2010?

21 A. Yes.

22 Q. And then the next attorneys you spoke to were Zeno Baucus
23 and his firm about representing you and bringing an action
24 against my client; is that right?

25 A. I spoke to multiple people. I don't know if that's the

1 next people I spoke to, but I did speak to Zeno Baucus, yes.

2 Q. And when you say "multiple people," were you consulting
3 with other attorneys about bringing this action?

4 A. Of course.

5 Q. And how many different attorneys did you consult with
6 prior to you hiring the Leavens Strand firm in 2012?

7 A. After Matthew Rieger recommended them, I didn't speak to
8 any other attorneys. I went with the Leavens, Strand & Glover
9 firm.

10 Q. My question is how many did you speak to?

11 A. I don't recall.

12 Q. And if you e-mailed with any attorneys, it would have been
13 in 2012, in 2011; is that right?

14 A. Yes.

15 Q. Okay. Now, Mr. Duke, we are here today because of the
16 motion for sanctions that was filed on behalf of our clients,
17 the Plaintiffs, in this case, right, against you and your
18 company.

19 Do you understand that?

20 A. Yes.

21 Q. And when you say "yes," I want to understand this. You
22 received that motion, reviewed it; is that right?

23 A. Yes.

24 Q. Okay. And you and your company are now represented by new
25 attorneys; is that right?

1 A. Yes.

2 Q. Okay. And that's Mr. Salam and Mr. Leonard, who is not
3 here today, and there is another attorney that's here; is that
4 right?

5 A. Yes.

6 MR. SALAM: Mr. Bisbikis, for the record.

7 MR. DAVIS: Thank you. I didn't want to mispronounce
8 it.

9 MR. BISBIKIS: Bisbikis.

10 MR. DAVIS: Bisbikis.

11 BY MR. DAVIS:

12 Q. Now, part of the reason we are here is because of issues
13 that were raised in Plaintiff's, my client's, summary judgment
14 motion that was filed in January of 2018.

15 Do you understand that?

16 A. Yes.

17 Q. And how do you understand that?

18 A. Because I have discussed it with my lawyers.

19 Q. And you have reviewed that January 2018 filing?

20 A. I believe so, yes.

21 Q. I just want to make sure, when you say "I believe so,
22 yes," did you review it or not review it?

23 A. I have reviewed the filing, the sanctions filing, yes.

24 Q. Okay. And I'm also talking about Plaintiff's summary
25 judgment motion that was filed in January of 2018, in addition

1 to what's pending now, the motion for sanctions. I want to
2 make sure you are aware of that filing, right?

3 A. I'm not sure I have seen that one.

4 Q. Do you recall in January of 2018 your lawyers filing a
5 motion for summary judgment on your behalf and your company's
6 behalf?

7 A. I know it was being worked on.

8 Q. Okay. But as you sit here today, you are not aware of the
9 substance of Plaintiff's January 2018 motion for summary
10 judgment?

11 A. No.

12 Q. Were you ever given a copy of that motion by your prior
13 counsel, Tom Leavens?

14 A. It's possible. I don't recall.

15 Q. Well, I'm asking you.

16 Do you recall?

17 A. I don't recall if I did.

18 Q. Do you recall if your attorney Travis Life gave you a copy
19 of the January 2018 motion?

20 A. I'm unsure.

21 Q. Do you recall if Mr. Stamatis gave you one?

22 A. I'm unsure if any attorney gave me one. I do not recall
23 seeing the document.

24 Q. And as part of your preparation for today, you didn't
25 review it?

1 A. I went through the exhibits that you attached. If it was
2 one of those exhibits, I would have reviewed it.

3 Q. And outside the exhibit list that we produced, you didn't
4 review anything for this case; is that right?

5 A. I don't believe so.

6 MR. SALAM: Objection.

7 Strike that, your Honor.

8 MR. DAVIS: I'm sorry, I didn't hear the answer.

9 THE WITNESS: With my attorney, I went through the
10 exhibit list, the Defendants' exhibit list and the Plaintiff's
11 exhibit list.

12 BY MR. DAVIS:

13 Q. So did your attorneys, and I will say -- when I say today
14 "prior attorneys," I mean Mr. Leavens, Mr. Strand,
15 Ms. Liberman, Mr. Life, Mr. Stamatis, Mr. Shonder.

16 Do you understand that?

17 A. Yes.

18 Q. When I say the "prior attorneys," I mean all of them, and
19 if I have a specific question about a specific attorney, I
20 will identify them.

21 Can we agree on that?

22 A. Understood.

23 Q. Okay. And is it your testimony today that your attorneys
24 made you aware in January of 2018 that Plaintiffs were
25 claiming that you and your company withheld documents from

1 production in this case?

2 A. I don't recall the exact time frame that I was made aware
3 of it, but it was somewhere in that period of time.

4 Q. I just want to be clear.

5 You were made aware of that claim, though, that you
6 and your company withheld documents in this case, right?

7 A. I believe closer to March as opposed to January, though,
8 but, yes, I was made aware.

9 Q. Do you recall which attorney told you first?

10 A. I do not.

11 Q. Do you recall what they told you about it?

12 A. I remember searching for e-mails. I remember being told
13 to search for certain e-mails that they felt had not been
14 handed over or whatever you would say.

15 MR. SALAM: Your Honor, I would like to object.

16 THE COURT: Hold on one second.

17 All right. Go ahead, Mr. Salam. What's the
18 objection?

19 MR. SALAM: Just so we can get this on the record.

20 THE COURT: Sure.

21 MR. SALAM: I would object on the basis of
22 attorney-client privilege. I'm willing -- I am fine with my
23 client discussing the conversations as it relates to the
24 motion for sanctions and the issues of discovery violations.
25 To the extent, otherwise, I would say that it's a limited

1 waiver, understanding I'm not asking you to rule on that at
2 this point, and not for any other purpose.

3 THE COURT: So is there an objection I need to rule
4 on?

5 MR. SALAM: Okay. At this time, no. I just want to
6 forewarn the court to the extent it goes beyond the discovery
7 issues, I will be objecting and trying to at least assert, for
8 the record, a limited waiver.

9 THE COURT: Okay. And I appreciate that.

10 MR. SALAM: I'm sorry to interrupt, your Honor.

11 THE COURT: I appreciate that.

12 Here's my view, and anybody who has tried a case in
13 front of me will tell you this is how I try a case:

14 Now, again, for the third or fourth time, there is no
15 jury here. I am not the straw that stirs this drink.

16 MR. DAVIS: I'm sorry, your Honor?

17 THE COURT: I am not the straw that stirs this drink,
18 okay? I don't need to be part of the show. I'm here to help.
19 If there is objections, I will rule on the objections. I will
20 take all the evidence. I will make a ruling. I don't want to
21 be the center of this. It's the clients' case, not mine,
22 okay?

23 So put on your evidence as best you can. Make
24 objections as best you can. I will make rulings. And then we
25 will have a record. But I'm not running the show. I'm just

1 calling balls and strikes, okay?

2 MR. DAVIS: Thank you, your Honor.

3 THE COURT: So go ahead, Mr. Davis.

4 MR. DAVIS: Thank you.

5 BY MR. DAVIS:

6 Q. So I'm clear, you don't recall the name of the attorney
7 that first told you about Plaintiff's claim that you
8 were -- that you and your company were withholding documents
9 in this case; is that right?

10 A. I remember in March of that year discussing with Travis
11 Life certain e-mails, but that's what I recall.

12 Q. And we will get to those specific communications. Your
13 attorneys and other attorneys have produced your e-mail
14 communications with Mr. Life.

15 You are aware of that, right?

16 A. Yes.

17 Q. Okay. And you authorized those documents to be produced?

18 A. Yes.

19 Q. Okay. And do you recall what Mr. Life told you in March
20 of 2018 about the allegations that you and your company had
21 withheld documents in this case?

22 A. Not exactly. It wasn't anything like that. It was more
23 of "We need to look for these certain e-mails. Can you please
24 send us these e-mails?" I don't remember him saying much more
25 than that. It was pretty much limited to, "Hey, we need to

1 find these e-mails. Can you please look these up?" kind of
2 thing, which was not inconsistent with, in the past, when they
3 had been looking for e-mails, and I would look up e-mails. So
4 I don't think I was fully aware of what was going on.

5 Q. And we will get to your process of gathering e-mails.
6 That's going to be something we are talking about today.

7 But the last thing you just said, you weren't aware
8 of everything that was going on, is that what you just said?

9 A. Yes, I was definitely not aware of the scope or the
10 magnitude of what was occurring.

11 Q. And why do you say that?

12 A. Because I know I have done nothing wrong, so I can't
13 imagine that I would be accused of anything. So I figured
14 what was happening is there was a mixup with the e-mails,
15 there was some unintentional mistakes by attorneys. It wasn't
16 a big deal. I was unaware that it was of this magnitude.

17 Q. And is that because your attorneys didn't provide you with
18 a copy of the motion papers and explain to you what the
19 problems were, the allegations by Plaintiffs that you and your
20 company withheld documents in this case?

21 A. I just simply don't recall if I saw that.

22 Q. So they may have told you that or may not; you just don't
23 recall as you sit here?

24 A. I do not recall as I sit here today.

25 Q. Okay. And, again, the prior attorneys I referenced, did

1 they also provide you, if you recall, with a copy of
2 Plaintiff's motion to amend the summary judgment motion and
3 for sanctions that Plaintiffs filed in April of 2018?

4 A. I remember seeing a sanctions filing recently. I don't
5 recall seeing all of this stuff in 2018, no. I'm not saying I
6 didn't see it. I just do not recall.

7 Q. So your testimony is that it could be that your
8 attorney -- your prior attorneys, gave you copies of all the
9 motions to look at, and you just don't recall if you received
10 them?

11 A. It's possible, yes, I don't recall them.

12 Q. All right. We have talked about the January 2018 motion
13 for summary judgment, right? I just want to go back here and
14 make sure.

15 A. Yes.

16 Q. You are aware that that motion was filed where Plaintiffs
17 claimed you and your company withheld documents, right?

18 A. You are telling me that it was filed, yes. I believe you.

19 Q. So independent of me telling you that, you had no
20 knowledge of it?

21 A. As I said, in March, I discussed with Travis Life that
22 there was some issue with e-mails, that's what I recall
23 happening, over the phone. I do recall -- I do remember that
24 phone call.

25 Q. Over the phone.

1 And were there e-mails also?

2 A. Well, I sent the e-mails, what they were looking for, yes.

3 Q. And what I'm talking about is after the conversation in

4 March, the next month is April of 2018, right?

5 A. Yes, it is.

6 Q. And are you aware that Plaintiffs filed another motion
7 with the court in April of 2018 seeking to amend their summary
8 judgment and seeking sanctions against you and your company
9 for withholding documents?

10 Are you aware of that? It is a second motion.

11 A. I don't recall.

12 Q. You don't recall reading that motion with your attorneys?

13 A. If I could see it, I could maybe have a better
14 recollection, but I do not recall seeing it, no.

15 MR. DAVIS: I ask the witness be shown Docket 239.

16 BY MR. DAVIS:

17 Q. Actually, look at the screen in front of you when Docket
18 Entry 239 in this case comes up.

19 I ask you to take a look at it and tell me if you
20 recognize it.

21 A. Can I move this page?

22 Q. I don't know.

23 THE COURT: You can go to the next page.

24 MR. DAVIS: Go to the next page.

25 THE COURT: That's not going to be helpful for you.

1 Go to the next one.

2 Keep going.

3 MR. DAVIS: Keep going.

4 THE COURT: Start with that.

5 MR. SALAM: Your Honor, may I ask a question?

6 Is there a way that we can get hard copies? It is
7 going to be much easier for the witness to review the document
8 if he actually has it.

9 THE COURT: Sure, there is a way, is if you have
10 copies and you give it to him, but I'm not going to make
11 copies and give it to him.

12 MR. SALAM: I don't know if Plaintiffs counsel had
13 hard copies of these.

14 MR. DAVIS: I don't. At the last hearing, you said
15 this was electronic. We came last week, set up, to avoid
16 making all the copies.

17 MR. SALAM: That's fine, your Honor.

18 THE WITNESS: Can someone scroll to the next page,
19 please?

20 MR. DAVIS: Yes. If you need to see another page on
21 a document, please, just ask.

22 THE WITNESS: Next page, please?

23 And next page, please?

24 It looks somewhat familiar. I don't recall.

25

1 BY MR. DAVIS:

2 Q. What about take a look at the next page?

3 THE COURT: Which would be Page 5.

4 MR. DAVIS: Page 5 of Docket 239.

5 BY MR. DAVIS:

6 Q. Do you see that?

7 Anything in there refresh your recollection?

8 A. No.

9 Q. Okay. Do you recall speaking to any of your attorneys
10 about this motion?

11 A. If this is the motion that we were filing the response to,
12 then yes.

13 Q. Okay. But you don't have any independent recollection, as
14 you sit here, about this document or speaking to your
15 attorneys about it?

16 A. In May of 2000 -- or was that this year, May of 2019?

17 No, I do not recall this.

18 Q. You are just guessing now; is that right?

19 A. No, I saw April, and I'm thinking, well, May, I met with
20 my attorneys, but I think that is May of 2019. It is not May
21 of 2018. So, no, I do not recall this.

22 Q. So in May of 2018, you recall meeting with your attorneys
23 to talk about this motion?

24 A. I just said May of 2019.

25 Q. Understood.

1 All right. And I'm trying to make sure that you are
2 fully aware of what Plaintiffs have charged you and your
3 company with, and you have now seen this document, and at the
4 time it was filed on April 6 of 2018, you were represented by
5 your prior attorneys; isn't that right?

6 A. Yes.

7 Q. I think at that time, Ms. Liberman was no longer with the
8 Leavens Strand firm; is that right?

9 A. Correct.

10 Q. Right?

11 And since the time in April 2018, are you aware that
12 there has been many court hearings regarding issues raised in
13 Plaintiff's motion to supplement its summary judgment and for
14 sanctions?

15 Are you aware of that?

16 A. In hindsight, I am aware that there were hearings, yes.

17 Q. Is it your testimony that when those hearings were taking
18 place, you were unaware of what was happening in your case?

19 A. Yes.

20 Q. Is it your testimony that none of your prior attorneys
21 advised you that there were hearings taking place in this
22 court before Judge Johnston in relation to Plaintiff's motion
23 for sanctions against you?

24 MR. SALAM: Objection, your Honor, foundation. I
25 know he is asking "Are you aware?" Can we get a time period

1 that we are dealing with here? I think that's creating some
2 confusion.

3 THE COURT: Why don't you try with a time frame. It
4 is a foundational question, but if you could narrow it, maybe
5 he will be able to --

6 MR. DAVIS: Sure.

7 THE COURT: Because I don't know what has happened
8 since, but a reasonable person would think in light of the
9 75-page motion for sanctions, seeking sanctions under almost
10 every conceivable basis that was filed in March of 2019, that
11 there was some discussions at some point. So if you could
12 kind of give a time frame, that might help. It may help. It
13 might not help. We will find out.

14 THE WITNESS: Thank you, your Honor.

15 MR. DAVIS: Thank you.

16 BY MR. DAVIS:

17 Q. Do you have any recollection of the first time your
18 attorneys told you, after April of 2018, that there was going
19 to be a court hearing about the sanctions being sought against
20 you and your company by Plaintiffs?

21 A. I do not.

22 Q. Do you recall, after April of 2018, the first time any of
23 your prior attorneys told you about any court hearing in this
24 case?

25 A. Yes, they would tell me there was a hearing today, but

1 there was not any, necessarily, huge discussions about the
2 hearings. Like I was in California. They were here. We
3 weren't meeting about it. We weren't necessarily discussing
4 things. But I knew that there would be hearings as they were
5 occurring.

6 Q. All right. And what I'm trying to understand is you
7 previously said, as you were sitting here on the stand today,
8 you were in the dark about something.

9 What did you mean by that?

10 A. I didn't grasp what sanctions were.

11 Q. So I understand, your testimony is that you knew about the
12 court hearings, but you didn't know about the severity of what
13 the sanctions that were being sought against you and your
14 company were; is that right?

15 A. That would be accurate, and I also didn't know what the
16 court hearings were about. My lawyers didn't say, "Oh, today
17 is the hearing about sanctions, today is the hearing about
18 this." There would be hearings. They would say, "Today was a
19 hearing." I had very limited discussions about what would
20 happen in these hearings.

21 Q. And in those communications where you had limited
22 discussions, you didn't ask your attorneys what was going on
23 in the case?

24 A. If I had limited discussions, I asked them in those
25 limited discussions, yes.

1 Q. In this scenario, though, in this case, you are the
2 client, right?

3 A. Yes.

4 Q. And aren't you asking your attorneys, "You went to a
5 hearing. What's happening? What happened today?"

6 A. I was trusting my attorneys. So whatever they were doing,
7 I was trusting them to do it.

8 Q. Okay. I also want to confirm that you have received,
9 read, and are aware of the Plaintiff's sanction motion that
10 was filed against you and your company on March 25th of 2019.

11 A. I did. Yes, I definitely read that one.

12 Q. And that's Docket Entry 294, right?

13 You recall the number of it?

14 A. No.

15 Q. All right. I want to make sure you read the whole thing.
16 There was a memorandum, right, a brief, plus a declaration
17 with lots of exhibits attached to it.

18 Did you see all of that?

19 A. I don't know about the exhibits. I read it. I don't know
20 about the exhibits.

21 Q. You read the motion, though?

22 A. Yes.

23 Q. Okay. And do you recall reviewing any of the supporting
24 documents or exhibits at all or just the references in the
25 brief to them?

1 A. Just the references in the brief.

2 Q. All right. And how did you learn about the filing of the
3 sanctions motion on -- that was filed on March 25th, 2019?

4 A. From my attorneys.

5 Q. And that's your prior attorney, right?

6 A. Prior attorney, yes.

7 Q. Right. I just want to keep that clear for the record
8 today, your prior attorney.

9 And who is the one that told you about it?

10 A. I do not recall.

11 Q. Would it have been a phone call or an e-mail?

12 A. I would have to think that would have been risen to the
13 level of a phone call. I don't recall the actual phone call,
14 but -- I don't recall.

15 Q. Do you recall what you were told by your attorneys, your
16 prior attorneys?

17 A. They just sent it to me. I read it and we discussed it.

18 Q. All right. And did you begin immediately investigating
19 the accusations and claims in the motion that Plaintiffs made
20 against you and your company?

21 A. No.

22 Q. You didn't? You did nothing?

23 A. Well, I don't believe any of it, so what am I going to do
24 about it?

25 Q. So in response to that motion, you did nothing?

1 A. Their job was to file an answer to it. That's not my job.

2 There is nothing I could have done about it.

3 Q. So there was nothing you did in connection with your

4 business in response to the motion, right?

5 A. No.

6 Q. You didn't contact your ESI vendors about where your data

7 was or was it stored properly, right?

8 MR. SALAM: Objection, foundation, your Honor.

9 THE COURT: Overruled. It is a foundational

10 question.

11 THE WITNESS: I personally did not, no.

12 THE COURT: And I assume you are calling this witness

13 as an adverse witness under 615?

14 MR. DAVIS: I am, your Honor.

15 THE COURT: Okay. Go ahead.

16 Thank you.

17 THE WITNESS: Your Honor, can you explain what that

18 means?

19 THE COURT: Well, he doesn't represent you, right?

20 So he is calling you in his case. So that allows him to ask

21 leading questions.

22 THE WITNESS: Okay.

23 THE COURT: Okay. That's what that means.

24 THE WITNESS: Thank you, sir.

25 THE COURT: You're welcome.

1 BY MR. DAVIS:

2 Q. And, again, I'm turning your attention to after you got
3 the motion, just to confirm, you did nothing in response to
4 receiving and reading that motion, right?

5 A. No, I was annoyed and frustrated and furious. It's
6 outrageous claims in there. So, yes, I was angered.

7 Q. Angered.

8 But you didn't do anything specifically in response
9 to the motion yourself?

10 A. My lawyers were writing the response. I was not writing
11 the response, so no.

12 Q. Outside of your lawyers writing a response to the motion,
13 did you or anyone in your company do anything in response to
14 the motion?

15 A. I do not understand your question. No, we didn't do
16 anything.

17 Q. What part of my question don't you understand?

18 THE COURT: He just answered it, "No, we didn't do
19 anything."

20 MR. DAVIS: Thank you, your Honor.

21 BY MR. DAVIS:

22 Q. Okay. So before July 2019 --

23 A. Right.

24 Q. -- none of your company e-mails or any company web-based
25 data or cloud-based data had ever been copied or preserved,

1 right?

2 A. No.

3 MR. SALAM: I'm sorry. Can I have the question read
4 back, your Honor?

5 THE COURT: All right. Hold on one second.

6 "Q. So before July 2019, none of your company
7 e-mails or any company web-based data or cloud-based data
8 had ever been copied or preserved, right?

9 "A. No."

10 THE WITNESS: That's false. Your statement is false,
11 to be clear. That's what I mean by "no."

12 BY MR. DAVIS:

13 Q. All right. Now I'm confused.

14 I had asked if it had ever been done, and you said
15 "no." That is confirming it was never done. Are we
16 speaking -- do we understand each other?

17 A. You said the data has never been preserved or copied,
18 correct? Never been preserved?

19 Q. Before July of 2019, none of your company e-mails had ever
20 been preserved fully, right?

21 A. False.

22 Q. Okay. When did it happen before July 2019?

23 A. I have never deleted an e-mail, so they have all been
24 preserved.

25 Q. That's not my question.

1 All right. Before July 2019, none of your company
2 e-mails had ever been preserved or copied or backed up in any
3 way, fully, right?

4 MR. SALAM: Objection, your Honor. I would like --

5 THE COURT: Basis?

6 MR. SALAM: I would say foundation based on
7 vagueness. I'm not sure what he means by "fully."

8 THE COURT: Overruled.

9 You can break it up into bite-sized pieces, if you
10 want.

11 THE WITNESS: Well, every e-mail is backed up right
12 now, so I don't understand the question.

13 THE COURT: He is asking you before July 2019. So we
14 are now in October of 2019. He is saying before 2019, have
15 any of your e-mails been preserved?

16 THE WITNESS: All e-mails have been preserved at all
17 times.

18 THE COURT: At all times. Okay.

19 Go ahead and ask the next question.

20 BY MR. DAVIS:

21 Q. So your testimony is today that since January of 2009, you
22 have never lost one e-mail from your e-mail account; is that
23 right?

24 A. False.

25 Q. Explain, please.

1 A. There was an auto-delete function on some of my e-mail
2 accounts. So there is some sent e-mails -- if you sent an
3 e-mail and it was never replied to, some e-mails are lost.

4 Q. Okay.

5 A. But only e-mails that literally were never replied to. An
6 e-mail that was replied to would be in my inbox. All the
7 inbox e-mails are still there.

8 Q. So I'm clear, and we will get into the auto-deletion
9 issue, but my question is prior to July of 2019, neither you
10 nor your company ever made a copy of your e-mail accounts; is
11 that right?

12 A. I don't understand what you mean by a "copy."

13 Q. Okay. If I take a piece of paper like this one in front
14 of me, right, this is the original, right?

15 A. Yes.

16 Q. And I'm holding up my outline and notes?

17 A. Yes.

18 Q. I go to a copy machine, right?

19 A. Yes.

20 Q. You have used a copier?

21 A. I have.

22 Q. I push the copy button, right?

23 A. Okay.

24 Q. Out comes a copy?

25 A. Correct.

1 Q. You understand what I mean by "copy"? You have got the
2 original and a copy, understand?

3 A. Okay.

4 Q. Same with electronic data, right?

5 A. Okay.

6 Q. When you say it's -- and my question is: Prior to July of
7 2019, neither you nor anyone at your company ever made a copy,
8 a full copy, of your e-mail accounts; isn't that correct?

9 A. I'm getting a little lost with this question. I'm sorry.

10 You are talking like the ESI discovery type, or what
11 exactly are you talking about?

12 Q. I'm talking about your e-mail accounts, right?

13 So we know from your deposition in this case that you
14 have a bduke@yahoo.com e-mail account, right?

15 A. No, brentduke, I have that one.

16 Q. Thank you.

17 That's the one you have been using for like 20 years,
18 right?

19 A. Yes.

20 Q. Yes.

21 You use it for personal stuff?

22 A. Yes.

23 Q. And you use it in connection with the business stuff?

24 A. Yes.

25 Q. Okay. And I'm saying before July of 2019, right?

1 A. I have never copied the e-mails. I have preserved them,
2 but I have never copied them.

3 Q. All right. So in your mind, there is a difference between
4 preserving and copying, right?

5 A. Yes.

6 Q. Okay. And my question is: At no time prior to July of
7 2019 did you ever make a copy of your Yahoo! e-mail account?

8 A. Okay, yes, that would be accurate.

9 Q. That's accurate. Right.

10 And prior to July of 2019, neither you nor anyone
11 made a copy of your GoDaddy e-mail accounts, right?

12 A. Of the entire account, no.

13 Q. Right.

14 A. Yes.

15 Q. Right.

16 And prior to July of 2019, no one made a copy of any
17 of your web-based data; is that right?

18 A. Correct, a full copy, correct.

19 Q. Right.

20 And prior to July of 2019, no one ever made a
21 complete copy of your cloud-based data; do you understand
22 that?

23 MR. SALAM: Objection.

24 THE COURT: Basis?

25 MR. SALAM: Foundation. I'm not sure what he means

1 by "web-based data" or "cloud-based data."

2 THE COURT: He is a very smart individual. If he has
3 any confusion as to the vagueness of the question, I'm sure he
4 will say he doesn't understand it. He has already done that
5 multiple times when he doesn't understand the question.

6 So overruled.

7 If you don't understand a question, Mr. Duke, just
8 say you don't understand it and explain why you don't
9 understand.

10 THE WITNESS: Okay. Thank you, your Honor.

11 THE COURT: Not a problem.

12 MR. DAVIS: Did you understand my question?

13 THE WITNESS: Can you repeat it?

14 BY MR. DAVIS:

15 Q. Prior to July of 2019, nobody -- you, nobody on your
16 behalf -- made a complete copy of any of your cloud-based
17 data, right?

18 A. I don't really have cloud-based data. I don't understand
19 what you mean by that.

20 Q. All right. Is it your testimony you have no data that you
21 control in any way in any cloud-based application?

22 A. Outside of e-mail?

23 Q. Outside anything.

24 A. Well, e-mail is cloud-based.

25 Q. Okay.

1 A. So that's cloud-based data.

2 Are you talking about something else, or are you
3 talking about e-mail right now?

4 Q. Well, I said e-mails, and then my second question was
5 web-based.

6 Outside of e-mails, what falls in the web-based
7 bucket?

8 A. That's what I'm asking you. It is your question, right?

9 Q. But you answered the question, so I thought you understood
10 the question, and you gave me an answer.

11 So I'm asking you to clarify how you answered my
12 question, and you said it had never been done.

13 A. The web-based e-mails is what you were discussing, right?

14 Q. No, I said e-mails first.

15 A. Yes.

16 Q. Then I said web-based data of any kind.

17 A. So including e-mails?

18 Q. Yes.

19 A. Okay. So, yes, it had, obviously, not been -- obviously,
20 no, because, yes, if e-mails are part of that, if the e-mails
21 were not --

22 Q. The easy question is before July of 2019, neither you nor
23 anyone at your company ever copied any of your data at all,
24 right, in full?

25 A. Any of my data at all? That's false.

1 Q. That's false. Okay.

2 And when you say that, you mean there could be a copy
3 of a piece of the data. That's why I'm breaking it down.

4 Did anyone ever copy all of your e-mails before July
5 of 2019?

6 A. No.

7 Q. And did anyone ever copy, before July of 2019, any of your
8 web-based data entirely?

9 A. That's where you are losing me. So web-based e-mails are
10 part of web-based data, so no.

11 Q. And tell me what the other part of the web-based data is.

12 A. That's what I don't know what you are adding. That's what
13 I'm asking you.

14 Q. Right. And I'm asking you. It is your company. It is
15 your data.

16 Other than e-mails, in your mind, you have something
17 that you are excluding from e-mails. So what is it?

18 A. No, you are lumping something in with e-mails.

19 Q. All right. So put the e-mails aside.

20 THE COURT: Stop, stop, stop.

21 Do you know if you have any web-based data from your
22 company? First question.

23 THE WITNESS: Outside of e-mails?

24 THE COURT: Outside of e-mails.

25 THE WITNESS: I cannot think of anything.

1 THE COURT: Okay. So if you don't know if there is
2 any web-based data outside of e-mails, you are not going to
3 know whether it was copied or preserved, fair?

4 THE WITNESS: And, also, if he is including e-mails
5 in web-based data, then, obviously, it wasn't all copied
6 because web-based data plus e-mails would be the entirety of
7 it, and that's where I'm not quite understanding.

8 THE COURT: We have covered the web-based e-mails.
9 Now we are talking about web-based data.

10 THE WITNESS: Yes, I can't think of any web-based
11 data outside of e-mails that was not preserved.

12 MR. DAVIS: Could you repeat the answer back?

13 THE COURT: He said, "Yes, I can't think of any
14 web-based data outside of e-mails that was not preserved."

15 That's what you said, right, Mr. Duke?

16 THE WITNESS: Yes.

17 BY MR. DAVIS:

18 Q. And can you think of any data that was not copied?

19 A. Like in a cloud, some type of data in a cloud? Is that
20 what you are discussing?

21 Q. Anything that's web-based is what I'm talking about.

22 A. The only thing that was not copied that was web-based that
23 I can think of is e-mails. I don't know what else would be
24 web-based. So I'm not sure what we are talking about.

25 Q. Well, isn't your understanding that your website is

1 web-based?

2 A. It is on my hard drive, though. So it has been copied.

3 Q. Got it.

4 And all the files related to your website -- and
5 which website are you talking about?

6 A. 21centurysmoking.com.

7 Q. Those are all on your laptop?

8 A. They should be, yes.

9 Q. Should be or are?

10 A. I can't think of why they wouldn't be. They should be,
11 yes. They are on my laptop.

12 Q. They are?

13 A. Yes.

14 Q. Okay. And I would ask that Plaintiff's Exhibit 66 be
15 displayed to the witness.

16 In front of you now is a document we have marked as
17 Plaintiff's Exhibit 66. I ask you to look at it and tell me
18 if you recognize it.

19 A. Can we scroll down?

20 Yes.

21 Q. How do you recognize it?

22 A. It's a very recent document, so I don't have to go back
23 far in memory.

24 Q. And before it was filed by your attorneys in this case,
25 you reviewed it, right?

1 A. Yes.

2 Q. And this document is a report to the court about all of
3 your and your company's electronically stored information; is
4 that right?

5 A. Yes.

6 Q. And when I say "electronically stored information," you
7 understand what I'm saying, right?

8 A. Yes.

9 Q. And what is it?

10 A. E-mails, social media, stuff like that, anything that's
11 not saved on a hard drive, that's in the cloud.

12 THE COURT: How about chats? Do you understand chats
13 are considered electronically stored information?

14 THE WITNESS: Well, I guess, yes. So anything on my
15 computer or anything that is electronically stored.

16 THE COURT: Communication on your computer.

17 THE WITNESS: Okay.

18 THE COURT: So that would include, for example,
19 Yahoo! chats.

20 THE WITNESS: Yes.

21 THE COURT: You understand that's encompassed in it,
22 ESI? Do you understand that?

23 THE WITNESS: I do now, yes.

24 THE COURT: Okay. That's why we are doing this.

25 THE WITNESS: Right. Thank you.

1 BY MR. DAVIS:

2 Q. And I ask you to look at Plaintiff's Exhibit 66, and if we
3 continue, Page 3, and continue on for me until, there, Page 4;
4 do you understand what's being listed there?

5 A. Yes.

6 Q. And what is it?

7 A. A list of people and the e-mail accounts that they had
8 with 21centurysmoking.com.

9 Q. And these were all e-mail accounts that are part of your
10 GoDaddy e-mail?

11 A. Yes.

12 MR. DAVIS: Okay. Next page?

13 And next page?

14 BY MR. DAVIS:

15 Q. Page 6, what is this a listing of here, at the bottom,
16 under the e-mail accounts?

17 Do you understand what that is?

18 A. More e-mail accounts.

19 Q. And some of those are not with your company account; is
20 that right?

21 A. Yes.

22 Q. And why are they listed here?

23 A. Because when we did this, whatever this thing is -- what
24 is it?

25 Whatever this thing is called, we were trying to make

1 it all-inclusive of everything that possibly could have been
2 because the Judge had said everything that possibly could have
3 been at 1535 North Ashland, find everything, look for
4 everything. So we went over the top, and there is things
5 listed there that are totally irrelevant to this case, but we
6 put every single thing that was possible to find
7 electronically in this document.

8 Q. Okay. And all that information came from you and -- it
9 came from you, right?

10 A. Yes.

11 Q. Did it come from anyone else?

12 A. Well, yes, they had to talk to other people to get some of
13 this information.

14 Q. All right. But you were the primary source of the
15 information for this document?

16 A. I would say so, yes.

17 Q. And that was filed with the court on August 13th, 2019?

18 A. Yes.

19 MR. DAVIS: And next page.

20 BY MR. DAVIS:

21 Q. And in that first paragraph on Page 7, it says:

22 "These last three e-mails account were used in
23 Craigslist postings that no longer exist?"

24 A. Yes.

25 Q. Is that right?

1 A. Yes.

2 Q. What does that mean?

3 A. Like we would post Craigslist ads all over the country
4 trying to get people to go to our website, so you can't use
5 the same e-mail over and over again. So we had multiple
6 e-mails that we would use. We would use our -- my
7 brentduke@yahoo, my wife's e-mails, and then these three
8 e-mails as well to post these ads. We did that for a very
9 brief time period.

10 Q. And those were used in what time period, though, 2009?

11 A. Yes.

12 Q. All right. And those were all lost, right?

13 I see at the top there, the last three listed there,
14 it says "not recoverable" on the right column; is that right?

15 A. Because we never used them again, yes.

16 Q. My question isn't whether you used them.

17 My question is those were not recovered, right?

18 A. Correct.

19 Q. That means they are lost?

20 A. Yes.

21 Q. Forever?

22 A. Correct.

23 MR. DAVIS: Okay. Next page.

24 BY MR. DAVIS:

25 Q. On Page 8, there is a listing here of devices.

1 Do you see that?

2 A. Yes.

3 Q. What is that?

4 A. It's the -- all of the computers that are still currently
5 in my house.

6 Q. And how is it that there is more than four listed there?

7 A. Because my college computer is listed there, a computer I
8 used 15 years ago is listed there; my wife's computer is
9 listed there, a laptop that she doesn't use for business; and
10 a desktop that was never really used -- or never used at all
11 in the course of business. So there is four that would have
12 been used for this business, four that are totally unrelated.

13 Q. All right. And the right side, it says "location." It
14 lists "office desk" -- sorry, the first one is "main device."
15 That's your main --

16 A. I believe that's my laptop.

17 Q. Okay. And the next one says "office desk"?

18 A. Yes.

19 Q. And the next one says "office desk"?

20 A. Yes.

21 Q. And the next one says "office desk"?

22 A. Yes.

23 Q. And then "garage," and then three list "office," right?

24 A. Yes.

25 Q. Those are all at your company's office?

1 A. Yes -- well, no, they are in the office in my house.

2 Q. Does your company have an office outside the office at
3 your home?

4 A. No, we have an office in our house at this point.

5 Q. So when it says "office," it means they are in your
6 business office?

7 A. Yes.

8 Q. Okay. And prior to --

9 A. Can I clarify?

10 Q. Please.

11 A. It says "office," but these were things that were in the
12 garage that we then brought into the office. So when the ESI
13 discovery people came to the house to get these, they took
14 them out of the office, but these were not kept in the office.
15 These were from the garage, some of these. Like I don't have
16 my Sony Vaio computer from 20 years ago sitting in an office.
17 It was just sitting in the garage.

18 Q. Okay. And it also says there was an issue with your
19 wife's phone. Was that resolved?

20 Do you know what I'm talking about?

21 A. No, it was not resolved.

22 Q. Do you see under -- it says "Duke Phones," and there is an
23 asterisk?

24 A. I said, no, it was not resolved.

25 Q. Oh, I'm sorry, I thought you said you don't understand.

1 It is still unresolved?

2 A. Yes.

3 Q. Do you know who is working on that?

4 A. It is an unresolvable issue because she doesn't know
5 whatever the password is that she needs to know to be able to
6 do this. So there is some password she must have put in at
7 some point. She doesn't know what it is, so there is no way
8 to get to that data to my understanding.

9 Q. So I'm clear, when you say it is still unresolved, it
10 sounds like it is resolved, and it will never be resolved, is
11 that right?

12 A. I'm not the expert on this.

13 THE COURT: Hold on one second.

14 He answered.

15 If you don't understand the question, go ahead. If
16 you can answer it, answer it. If you don't, tell him you
17 don't understand, and we will try to figure it out.

18 THE WITNESS: Okay. Thank you.

19 MR. DAVIS: The next page of the exhibit.

20 BY MR. DAVIS:

21 Q. All right. Do you see Page 9 in front of you of the
22 Exhibit 66?

23 A. Yes.

24 Q. All right. These list social media accounts, right?

25 A. Yes.

1 Q. And you understand that all to be electronically stored
2 information, right?

3 A. I wouldn't have before doing this, but I guess now, yes.

4 Q. Before doing this, you didn't understand that like a
5 social media account, like Instagram, was based on electronic
6 information?

7 A. I didn't realize that it was electronically stored
8 information. Something that is just available to the public,
9 I didn't realize it was a part of this, no.

10 Q. And no one had ever explained that to you before August of
11 2019?

12 A. No.

13 Q. And to be clear --

14 THE COURT: Hold on one second.

15 Okay. Go ahead.

16 BY MR. DAVIS:

17 Q. And to be clear, when I say anyone, I'm including your
18 prior attorneys. They never explained to you what
19 electronically stored information was before August of 2019?

20 A. They did explain to me what electronically stored
21 information was.

22 Q. Do you recall when that was?

23 A. A very early meeting with Mr. Leavens, he explained not to
24 delete anything, and that was probably the very first time I
25 met with him. "Don't delete any documents, don't delete any

1 data, don't delete anything from your computer because it is
2 going to be searched at some point and discovered," or
3 whatever the term is. "Someone is going to come, look through
4 your computer. Don't delete any documents. Make sure
5 everything is still there." That's what was explained to me.

6 Q. All right. And did he explain to you that included all of
7 your e-mail accounts?

8 A. I don't know if he specifically said e-mail. It went
9 without saying, but I don't know if he specifically said
10 e-mail.

11 Q. Did you understand his instructions to include e-mails?

12 A. Yes.

13 Q. And did it include social media accounts?

14 A. I never even thought about social media accounts in that
15 way.

16 Q. What about did his instructions include web-based
17 services?

18 A. Can you give me an example of a web-based service?

19 Q. Sure.

20 I will draw your attention to Plaintiff's Exhibit 66
21 in front of you. Page 9 is displayed. Section D says:
22 "Other Web-Based Services."

23 Do you see that?

24 A. Yes.

25 Q. You reviewed this document?

1 A. Yes.

2 Q. You understood what it meant when you read it the first
3 time?

4 A. Yes.

5 Q. You authorized and approved this to be filed on behalf of
6 yourself and your company on August 13, 2019?

7 A. Yes.

8 Q. What does it mean?

9 A. I didn't create these subheadings, so I don't know
10 exactly -- I don't know exactly what searching Authorize.Net
11 or any of my payment processes would have to do with anything
12 related to this case. So I don't fully understand why all
13 this stuff is here or what the point of it is. So I don't
14 understand. I don't know.

15 Q. Do you understand -- are you familiar with Amazon?

16 A. Yes.

17 Q. Are you familiar with Carbonite?

18 A. Yes.

19 Q. Are you familiar with Dropbox?

20 A. I don't really use it, but, yes, I know what it is.

21 Q. I'm sorry?

22 A. I don't really use it, but, yes, I know what it is.

23 Q. Do you know what eBay is?

24 A. Yes.

25 Q. Do you know what PayPal is?

1 A. Yes.

2 Q. Do you know what Zen Cart is?

3 A. Yes.

4 Q. Do you know what RankPop is?

5 A. Yes.

6 Q. Do you know what Groupon is?

7 A. Yes.

8 Q. Do you understand all those to be web-based services?

9 A. Yes, I guess that makes sense.

10 Q. Well, I'm not asking if it makes sense. I'm asking you to
11 confirm that you understand that those services are web-based
12 services.

13 A. Yes.

14 Q. They are?

15 A. Yes.

16 Q. No question in your mind?

17 A. No question in my mind.

18 Q. And all the things listed here are web-based services that
19 you or your company used in connection with your business,
20 right?

21 A. Yes.

22 Q. And the last two, RankPop and Groupon, do you see those
23 two?

24 A. Yes.

25 Q. Your glasses okay?

1 A. No. But, yes, I see them.

2 Q. Okay. After RankPop, on the right, it says: "Data not
3 recoverable provider."

4 What does that mean?

5 A. I believe they went out of business.

6 Q. Do you know when they went out of business?

7 A. I do not.

8 Q. Can you look at the asterisk after the word "RankPop" and
9 look at the first asterisk footnote?

10 A. They went out of business in 2014.

11 Q. Outside of the information in this document, do you have
12 any personal knowledge of that?

13 A. No, I don't recall how that got there. I don't recall if
14 I found that or if they found that independent of me.

15 Q. And prior to -- prior to this report being filed in August
16 of 2019, neither you nor anyone at your company made a copy of
17 your RankPop web-based service account; is that right?

18 A. There is no RankPop account that could have been copied.

19 Q. Is it your testimony that neither you nor your company had
20 a web-based account with RankPop? You didn't use their
21 services in any way?

22 A. We used their services. They posted on our social media
23 and things, but there was no account set up with them. They
24 would do -- they would do posting for us on our social media
25 websites. That's what we paid them for.

1 Q. And they would -- and they would have an online account
2 that maintained the information that they were -- and services
3 they were doing for you and your company, right?

4 A. You can just look on my Facebook. That would be all of
5 the stuff that they did.

6 Q. Right.

7 It is all there?

8 A. Yes.

9 Q. All right. So it says here "Data not recoverable by
10 provider."

11 What does that mean?

12 A. I don't know.

13 Q. So your testimony today is you have all your RankPop data
14 available, preserved, and ready to be searched; is that right?

15 A. If you go on my Facebook page, you will see it.

16 Q. Got it.

17 And all the RankPop data is limited to just your
18 Facebook account?

19 A. That's where they primarily did their work. They posted
20 blogs. I believe all the blogs link to my Facebook. So I
21 don't know what else they did, but I believe most of what they
22 did would have been on my Facebook, but everything they did is
23 social-media based. So anything should be searchable. There
24 would be a time period where if you look through my social
25 media accounts, it was their work.

1 Q. Okay. And on that same page, under "Social Media," those
2 were all your and your company's social media accounts, right?

3 A. To the best of my knowledge, yes.

4 Q. So for today, my shorthand, when I say "ESI," you know
5 what I'm referring to, right?

6 A. Like discovery stuff.

7 Q. Electronically stored information. Do you understand
8 that?

9 A. Okay. Okay. Yes.

10 Q. All right. I just want to use that as a shorthand because
11 that's what has been in the motions, that's what we all talk
12 about, and your attorneys have talked to you about ESI, right?

13 A. Yes.

14 Q. All right. And you understand what it is?

15 A. Yes.

16 Q. It is electronically stored information?

17 A. Okay. Got it.

18 Q. Do you understand?

19 A. Got it.

20 Q. And that's all the stuff that's in this report, this P-66
21 we just reviewed, right?

22 A. Yes.

23 Q. e-mails?

24 A. Yes.

25 Q. Do you understand? Yes?

1 Social media accounts that you have, right?

2 A. Yes.

3 Q. Web-based services, right?

4 A. Yes.

5 Q. All your hardware, hard drives on your computers, and your
6 phones, right?

7 A. Yes.

8 Q. You understand that's what "ESI" is now?

9 A. Yes.

10 THE COURT: Hold on one second.

11 In your mind, would the Yahoo! Chat be a web-based
12 service?

13 THE WITNESS: Yes. I mean, it was part of -- it was
14 integrated into Yahoo! Mail at some point, yes.

15 THE COURT: Okay. All right. Thank you.

16 BY MR. DAVIS:

17 Q. And you had described how Yahoo! is your Yahoo! e-mail
18 account. You have used that for 20 years, and it is your
19 primary e-mail account, right?

20 A. Yeah. 19, 20 years, yes.

21 Q. 19, 20 years.

22 Yes, I think in 2015, you said 15 years, so that's
23 where I got the 20 from.

24 And since 2012, January of 2012, you have continued
25 to use that Yahoo! e-mail account, right?

1 A. Yes, it is my primary e-mail account, yes.

2 Q. And used it continuously since that time, through today?

3 A. Yes.

4 Q. And since 2012, you have continued to use your company
5 GoDaddy e-mail accounts, right?

6 A. Can you repeat that question?

7 Q. Yes.

8 Since the year 2012, when this lawsuit started, you
9 were using your two e-mail accounts that are your GoDaddy
10 accounts, right?

11 A. Yes.

12 Q. And those are what?

13 For the record, identify them.

14 A. bduke@21centurysmoking.com is the primary.

15 THE COURT: Hold on. bduke@21centurysmoking.

16 THE WITNESS: .com.

17 THE COURT: .com.

18 Just so you know, in my head, you are "Smoking," and
19 Mr. Bengoa is "Smoke."

20 So you have got bduke@21centurysmoking.com.

21 What's the next one?

22 THE WITNESS: support@21centurysmoking.com. I don't
23 really use that one as much. I usually use the
24 bduke@21centurysmoking.com or the brentduke@yahoo.com.

25 THE COURT: So the bduke@21centurysmoking.com and

1 support@21centurysmoking.com, those are the two GoDaddy
2 accounts?

3 THE WITNESS: Yes.

4 THE COURT: Any other GoDaddy accounts?

5 THE WITNESS: The ones that are listed on here, but I
6 don't use those other ones.

7 THE COURT: Okay. That was going to be my next
8 question. Did you ever use those GoDaddy accounts for work?

9 MR. DAVIS: Displaying now Page 6 of P-66.

10 THE WITNESS: Do you want me to go through all these
11 e-mails accounts?

12 THE COURT: Yes.

13 Let's start with -- we know that you used
14 bduke@21centurysmoking.com.

15 THE WITNESS: The bduke@evtcigs was something I
16 believe I created in, like, 2015 or 2016.

17 The bduke@farmers --

18 THE COURT: Hold on.

19 Did you use that evtcigs?

20 THE WITNESS: I never actually sent an e-mail --

21 THE COURT: I'm sorry?

22 THE WITNESS: I never actually used it for anything.

23 THE COURT: That was my question.

24 How about bduke@farmersolution.com?

25 THE WITNESS: Yes, this is very old. This is from,

1 like, 2008, maybe. 2008, 2009, something like that.

2 THE COURT: Did you ever use it for work?

3 THE WITNESS: For this work or for Farmer Solution
4 work?

5 THE COURT: I don't know what Farmer Solution is.

6 THE WITNESS: I was trying to -- I was working with
7 Farmers at that time, trying to -- I branched away from the
8 company I was working with and was trying to -- because I
9 needed to be working at home. So I was trying to create a
10 company that I didn't really -- this came along. I stopped
11 doing that. I don't know if there is one or two e-mails in
12 there.

13 THE COURT: So bduke@farmersolution.com didn't relate
14 to or do work regarding electronic cigarettes --

15 THE WITNESS: Absolutely not.

16 THE COURT: -- fair to say?

17 Okay.

18 THE WITNESS: And then brandon@21centurysmoking.com
19 would be my brother. I don't know if he ever really used it
20 that much. I certainly did not use it.

21 bryan@21centurysmoking would be Bryan Kos. I never
22 used it.

23 froggieandjim would be some employees we had in Ohio.
24 I never used that one.

25 info@automaticcigarettes, that would be the other

1 brand I had. I don't know if I ever used that one. I might
2 have, but not for this company.

3 jason@21centurysmoking.com, I believe, is a gentleman
4 who set up a -- it is up here -- yes, it is a customer who set
5 up his own store. I never used that e-mail.

6 krenar@21centurysmoking.com is someone who is doing
7 wholesale stuff. I never used his e-mail.

8 laurie@21centurysmoking.com, my wife, I never used
9 that e-mail.

10 rob@21centurysmoking.com would be Rob Link. Again, I
11 didn't use that e-mail.

12 robert, same thing, I didn't use that e-mail.

13 sales@21centurysmoking.com, I don't know what that
14 is. So I'm not sure if I ever used that. I don't know what
15 it is.

16 spraker@21centurysmoking would be Steve Spraker, I
17 did not use that e-mail.

18 support, as I have said before, I did use that
19 e-mail.

20 support@sportsdoctrine.com, I don't know if I ever
21 sent e-mails from that, but that would be from 2007.

22 support@wholesaleelectroniccigarettes.com, I do not
23 recall if I ever did anything on that one either, I don't
24 think so, not related to this company.

25 test@21centurysmokes.com, I don't think I ever used

1 that.

2 test@21centurysmoking.com, I don't think I used that.

3 wholesale@automaticcigarettes.com, no idea if I used

4 that one.

5 And then brentduke@yahoo.com and this

6 21centurysmoking@yahoo.com.

7 THE COURT: It says "in process."

8 THE WITNESS: I'm not sure what that one is. That
9 might be related to doing Craigslist ads as well. I'm not
10 sure.

11 brentlaurieduke@yahoo.com, I think that is also
12 relating to the Craigslist.

13 laurie.duke@yahoo.com is my wife's old e-mail. She
14 still has it. She doesn't really use it.

15 And then bsd and those last three, they are,
16 obviously, not GoDaddy either, but those ones are all for the
17 Craigslist stuff.

18 THE COURT: All right. Okay. Thank you.

19 Go ahead, Mr. Davis.

20 MR. DAVIS: Thank you, your Honor.

21 BY MR. DAVIS:

22 Q. And, Mr. Duke, turning back to Page 6 of this list, for
23 example, when you said brandon@21centurysmoking.com, I believe
24 your testimony was "I never used it." Is that what you said?

25 A. Yes.

1 Q. But someone used it, right?

2 A. My brother may have used it. It was his e-mail. I didn't
3 go through his e-mails. He may never have used it. I have no
4 idea if he used it.

5 Q. Right. And before August -- strike that.

6 Before July of 2019, none of these e-mail accounts
7 listed here, no one had ever made a copy of the entire e-mail
8 accounts; is that right?

9 A. Correct.

10 Q. And that's the same -- I could ask you the same question
11 for anyone on this list, and that would be true, right?

12 A. Absolutely, yes.

13 Q. Right.

14 And when you said, "I don't use it," for example,
15 like robert@21centurysmoking.com, one of your employees named
16 Robert used that account, right?

17 A. Possibly.

18 Q. Did you have employees that worked for your company?

19 A. Yes.

20 Q. Did you give them e-mail accounts for your company on your
21 GoDaddy account?

22 A. Yes.

23 Q. Did you tell them to use their company e-mails?

24 A. I didn't direct anyone to use them. Some people did; some
25 people didn't.

1 Q. So for each e-mail account that you set up here on your
2 GoDaddy account, there are e-mails being received and sent
3 from them, right?

4 A. If they used them, right.

5 THE COURT: Okay. Pause for a second.

6 So you have these employees. You give them the
7 e-mail accounts that are GoDaddy accounts, and they all end
8 with "21centurysmoking.com," right?

9 THE WITNESS: Correct.

10 THE COURT: And you have said a couple of times "if
11 they used those accounts," right?

12 THE WITNESS: Correct.

13 THE COURT: So to your knowledge, were your employees
14 using other e-mail accounts for work purposes other than the
15 21centurysmoking.com e-mails?

16 THE WITNESS: I -- as an example, Jim and Froggie, I
17 can't see any reason at all why they would need to use a
18 21 Century Smoking e-mail address, other than to send sales
19 forms back and forth. I don't know if they also used their
20 personal e-mail addresses to send sales forms back and forth
21 or if they even used this. I haven't looked through these
22 people's e-mails to see. I know Rob Hough did not like to use
23 this e-mail, so he would use his personal e-mail. So when I
24 e-mailed Rob Hough, I would e-mail robhough@live.com.

25 THE COURT: Hold on one second.

1 You e-mailed Rob Hough. Spell that.

2 THE WITNESS: The robert@21centurysmoking.com, that
3 one down there.

4 THE COURT: Okay. Robert@21centurysmoking.

5 And Howe, H-o-w-e?

6 THE WITNESS: H-o-u-g-h.

7 THE COURT: Or the other version, H-o-u-g-h.

8 So he was using his own personal e-mail account for
9 work purposes?

10 THE WITNESS: Yes, he didn't like to use this e-mail.
11 He didn't like it.

12 And Steve Spraker wasn't a huge fan of it, so he
13 would forward the e-mails to his personal account.

14 THE COURT: Steve Spraker, I know that is on here
15 somewhere.

16 THE WITNESS: So like the spraker@21centurysmoking --

17 THE COURT: Hold on. We can't talk over each other.

18 Okay. Steve Spraker, S-p-r-a-k-e-r.

19 What did Robert Hough and Steve Spraker do for 21
20 Century Smoking?

21 THE WITNESS: Robert Hough was the guy who did phone
22 calls, he did website stuff for us, just kind of a do-it-all
23 guy. He did a little bit of everything in our warehouse.

24 THE COURT: Okay.

25 THE WITNESS: Steve Spraker was like a co-owner of

1 the store in Ohio and the store in Chicago.

2 THE COURT: Co-owner of a store, okay, Ohio and
3 Chicago. All right.

4 Any idea what personal e-mail accounts Robert Hough
5 used when he was doing work for 21 Century Smoking?

6 THE WITNESS: I believe he was like @live.com or
7 something like that.

8 THE COURT: At what .com?

9 THE WITNESS: Like @live.com, robhough@live.com or
10 something like that.

11 BY MR. DAVIS:

12 Q. Is that @live.com?

13 A. Something like that, yes.

14 THE COURT: Okay. And how about Steve Spraker, what
15 e-mail account did he use for work purposes, if you know?

16 THE WITNESS: I do not recall.

17 THE COURT: Okay. All right.

18 THE WITNESS: I believe that my discovery team has
19 been reaching out to these people, though, and asking which
20 e-mails they are using and then getting the e-mails. It is
21 the best they can. No one deleted e-mails. I made sure
22 everyone knew this whole time not ever to delete anything. So
23 whether it was on this or whether it was on their personal
24 e-mails, it should all still be there.

25 THE COURT: So any time before August 13, 2019, any

1 idea if Robert Hough's e-mails used -- any e-mails sent from,
2 received by the @live e-mail account relating to 21 Century
3 Smoking, were those preserved, if you know?

4 THE WITNESS: They should all be preserved, yes.

5 THE COURT: They should all be preserved.

6 What's your basis for thinking that they are all
7 preserved?

8 THE WITNESS: Because I should have it in my e-mail
9 because I would have sent him e-mails. So I would have sent
10 him from brentduke@yahoo.com to robertough@live.com. So in
11 searching my brentduke, I would think that you get all the
12 Robert Hough e-mails that were related to me.

13 THE COURT: How about e-mails -- his work e-mails
14 that went to people other than you?

15 THE WITNESS: He wouldn't have been e-mailing anyone
16 other than me. Maybe support@21centurysmoking.com to e-mail
17 my wife, but he wouldn't have been e-mailing customers or
18 anything like that.

19 THE COURT: Okay. How about Steve Spraker, his
20 e-mails, were those preserved, if you know?

21 THE WITNESS: I believe that he told my team that he
22 does have all of those e-mails still preserved.

23 THE COURT: Okay. Before August 13th of 2019, do you
24 know if Steve Spraker's e-mails were preserved? And that's
25 his personal e-mail account, not this 21centurysmoking, which

1 apparently he didn't like to use. I'm asking about whatever
2 else he was using.

3 THE WITNESS: Yes, that's what I'm talking about,
4 what I just said. Like when my team reached out to him about
5 his personal e-mail accounts, they said that he had them. To
6 the best of my knowledge, he still has all of those e-mails.
7 He saved them all.

8 THE COURT: All right. As to Robert Hough's
9 work-related e-mails that were sent or received at the @life
10 e-mail account --

11 THE WITNESS: I think live, l-i-v-e.

12 THE COURT: -- @live e-mail, were those searched for
13 this case, if you know?

14 THE WITNESS: As of right now?

15 THE COURT: As of August 13th, 2019.

16 THE WITNESS: I believe my team reached out and
17 talked to him, so I'm -- I don't know where they are in terms
18 of where they are in getting this information.

19 THE COURT: Okay. How about Steve Spraker, as of
20 August 13th, 2019, regarding his e-mails sent from or received
21 to whatever personal e-mail accounts that he was using that
22 were not the 21centurysmoking, were those preserved, if you
23 know?

24 THE WITNESS: To the best of my knowledge, yes.

25 THE COURT: Have those been searched as of

1 August 13th, 2019?

2 THE WITNESS: My counsel, Sean, would know this
3 better than me where they are in terms of this production, but
4 I don't know exactly where they are at with all these
5 individuals. They did custodian individuals, I believe they
6 are called, with every single one of these people, and they
7 found out every single e-mail address that every single person
8 had and could have used, and they were supposed to be
9 searching all of them.

10 THE COURT: Okay. When did you know Robert Hough was
11 not using his 21centurysmoking e-mail account for work
12 purposes and using the @live or @life e-mail account?

13 THE WITNESS: I mean, he preferred to be e-mailed to
14 his personal e-mail. If he was doing something, sending out
15 to a customer or something business related, he would use this
16 robert or he used support, but if it was me and him
17 communicating, he much preferred me just to write to his
18 personal e-mail.

19 THE COURT: Okay. When did you know he was doing
20 that?

21 THE WITNESS: I mean, whenever he was working for me.
22 2011, 2012, when he was working for me.

23 THE COURT: All right. How about Steve Spraker?
24 When did you learn that he was using his personal e-mail
25 account for work purposes?

1 THE WITNESS: He was actually forwarding e-mails from
2 this account to his personal account. The same, he taught me
3 how to do that because I would much rather just use my Yahoo!
4 account as well. So he was forwarding all the stuff to, I
5 believe, his Gmail account, and I think from very early on,
6 whenever I gave this to him. I think it was pretty quickly
7 thereafter forwarding all of the e-mails.

8 So they would be in this inbox if something was sent
9 to him that was business related, but it would also have been
10 sent to his Gmail account, and he may very well have been
11 replying out of his Gmail account.

12 THE COURT: Okay. So when did you learn Steve
13 Spraker was using a non-work e-mail account for work purposes?

14 THE WITNESS: That would have been back in 2010,
15 2011, 2012, I mean the whole time he was working there.

16 THE COURT: Okay. All right. Go ahead, Mr. Davis.

17 MR. DAVIS: Thank you, your Honor.

18 BY MR. DAVIS:

19 Q. And focusing your attention now back to the GoDaddy --

20 THE COURT: It is 11:00 o'clock.

21 MR. DAVIS: Excuse me?

22 THE COURT: It is 11:00 o'clock. We are going to
23 take a quick break, okay?

24 (Recess taken.)

25 THE CLERK: Recalling 12 CV 50324, DR Distributors,

1 LLC v. 21 Century Smoking, Inc.

2 THE COURT: Okay. So, Mr. Duke, I was asking you
3 some questions about Robert Hough and Steve Spraker's e-mail
4 that was sent from and received at their personal accounts,
5 not their 21 Century Smoking accounts, and I had asked whether
6 they had been preserved, and you talked a little bit about
7 that, and I'm trying to find on the transcript here, I thought
8 you said something about they should be preserved on your
9 e-mails as well.

10 Did I hear you right on that, that if Robert Hough
11 sent you an e-mail from his @live e-mail account, you would
12 have that on your e-mail account as well; is that correct? I
13 could be wrong. I'm just trying to remember.

14 THE WITNESS: Yes. So if he sent me an e-mail, and
15 they are searching my e-mails, I should have all the e-mails
16 he sent me.

17 THE COURT: Okay. Now, if you replied to Robert
18 Hough at the @live e-mail account, would that have been
19 preserved?

20 THE WITNESS: If I replied to him from
21 brentduke@yahoo.com, yes. If I replied to him from any other
22 account, and he replied back, yes.

23 THE COURT: Okay. Well, when did the
24 auto-purge -- did the auto-purge apply to e-mails sent from
25 your account?

1 THE WITNESS: It applies to e-mails that were sent,
2 but never were replied to. So if I sent an e-mail, and I got
3 an e-mail back, it is going to have the e-mail chain.

4 THE COURT: But never replied to?

5 THE WITNESS: Yes. So only e-mails that I sent that
6 never got a reply, because if I got a reply, then I'm going to
7 have in my inbox what I sent and the reply.

8 THE COURT: All right. How about if Bob Hough sent
9 you an e-mail about a topic and you picked up the phone and
10 you called him?

11 THE WITNESS: If he sent me an e-mail, I would have
12 it because it only auto-purged sent e-mails. It did not
13 auto-purge the inbox.

14 THE COURT: Okay. So any e-mails -- just to be
15 clear, any e-mails from Robert Hough that were sent from the
16 @live e-mail account to you, those have been preserved as far
17 as you know?

18 THE WITNESS: Absolutely, yes.

19 THE COURT: Okay. Go ahead, Mr. Davis.

20 MR. DAVIS: Thank you, your Honor.

21 BY MR. DAVIS:

22 Q. And when you say "preserved," you mean they are just
23 sitting in his active, live, being used e-mail account?

24 A. He said any e-mails from Robert Hough to me are preserved
25 because we have done this discovery, and we have done

1 discovery on my e-mail accounts.

2 Q. Got you.

3 But before August of 2019, there was no preservation
4 of that account, right?

5 A. Correct.

6 Q. Right.

7 And just to be clear --

8 A. There is no copy of the account, but there was
9 preservation.

10 Q. Right.

11 I understand, in your mind, preservation is different
12 than making a copy of it, right?

13 A. Yes.

14 Q. Got it.

15 And prior to August of 2019, no copies were made of
16 these accounts; is that right?

17 A. Not no copies.

18 Q. No one made an entire copy of your GoDaddy e-mail account,
19 right?

20 A. Not the entire account, no.

21 Q. And there was no copy made of Robert Hough's e-mail
22 account, right?

23 A. Correct.

24 Q. And there was no copy made of Robert Link's account,
25 right?

1 A. Correct.

2 Q. And there was no copy made of Steve Spraker's account,
3 right?

4 A. Correct.

5 Q. And no copy made of Krenar Koleci, right?

6 A. Correct.

7 Q. And no copy made of Bryan Kos, right?

8 A. Correct.

9 Q. And no copy made of Jim Shimp, right?

10 A. Correct.

11 Q. And no copy made of Brandon Duke, right?

12 A. Correct.

13 Q. And no copy made of Laurie Duke's account, right?

14 A. Correct.

15 Q. And no copy made of your account, right?

16 A. Correct.

17 THE COURT: Okay. Hold on one second.

18 (Brief pause.)

19 THE COURT: Do you want the last question and answer
20 read back?

21 MR. DAVIS: Please, your Honor.

22 THE COURT: Okay. Sorry for interrupting.

23 (Record read.)

24 BY MR. DAVIS:

25 Q. And I'm directing your attention now back to Exhibit P-66,

1 which is in front of you.

2 See Page 4 in front of you?

3 A. Yes.

4 Q. Again, that's Docket 318.

5 Do you see the entry there that's the one, two,
6 three -- the fifth one down, it says "Robert Hough"?

7 A. Yes.

8 Q. And you see the last one on Page 4, it says "Steve
9 Spraker"?

10 A. Yes.

11 Q. All the information in here was given to the ESI vendor,
12 that wrote this report, from you, right?

13 A. Or they talked with Steve Spraker.

14 Q. Or they talked with Steve Spraker or Robert Hough, right?

15 A. Yes.

16 Q. And I'm looking in the Robert Hough entry. Where does it
17 talk about him using his live account to e-mail with you?

18 A. It doesn't talk about that.

19 Q. And I'm looking at the Steve Spraker entry. Where does it
20 talk about in there using his personal e-mail account to
21 communicate with you?

22 A. It does not.

23 Q. And --

24 A. It says, "Defense counsel was able to locate his work
25 phone number, left him a message, and waiting to talk to him."

1 So since, they have talked to him. This is only a status
2 report. This doesn't have the full information.

3 Q. Right.

4 But they spoke to you, right?

5 A. Yes.

6 Q. And you didn't tell them anything about the story you just
7 told the Judge about this live account and this personal
8 account, right? It is not listed here?

9 A. Because this is describing the people who have e-mail
10 accounts with my company. It is not describing every e-mail
11 account they have ever had.

12 Q. Where does it say in this report that this ESI company is
13 going to be looking at Mr. Spraker's personal account or
14 Mr. Hough's live account? Where does it say that?

15 A. They had yet to discuss this with Mr. Spraker.

16 Q. And you didn't tell them about it, right, because it is
17 not listed here?

18 A. I'm telling you because I know they have talked to
19 Mr. Spraker. So I'm telling the Judge because I know they
20 have talked to Mr. Spraker. So I'm telling you more than is
21 on this report.

22 Q. Telling us more.

23 And how do we know the ESI company is going to be
24 doing that work and looking into these two e-mail accounts if
25 it is not listed here in their report they filed with the

1 court on August 13th, 2019, which you reviewed and approved?

2 MR. SALAM: Objection to the form of the question,
3 your Honor.

4 THE COURT: Overruled.

5 Go ahead and answer, if you can.

6 THE WITNESS: This is where they were at when this
7 was filed.

8 THE COURT: So something has happened between
9 August 13th and October 28th of 2019?

10 THE WITNESS: Absolutely, your Honor. They are
11 moving forward every day.

12 THE COURT: Okay.

13 BY MR. DAVIS:

14 Q. Have they given you an updated report?

15 A. We have not taken the time to do an updated report that I
16 have seen.

17 Q. Okay. One of the things Judge Johnston asked you was your
18 understanding that chat was included in ESI.

19 Do you recall that question?

20 A. Yes.

21 Q. And you answered "yes," correct?

22 A. Yes.

23 Q. And I want to understand when you say "chat," does that
24 mean instant messaging accounts that are available?

25 A. Yes, that's how I understood it.

1 Q. That's how you understood it?

2 A. Yes.

3 Q. And that includes all the instant messaging accounts that
4 you used as part of your business; is that right?

5 A. Yes.

6 Q. And as far as you know, that includes the Yahoo! Messenger
7 chat application?

8 A. Yes.

9 Q. Okay. And all of the GoDaddy e-mail accounts for your
10 company listed in this report, those were continuously used,
11 whether heavily or lightly, by the people you assigned them
12 to, right, since the time you opened those accounts?

13 Is that right?

14 A. I have not looked at many of those accounts, so I don't
15 know.

16 Q. You don't know.

17 You don't know how much they were used, but they were
18 used to some degree?

19 A. I believe some of them, like Krenar, I believe, was not
20 used at all. So I believe some were not used at all.

21 Q. Okay. At some time in 2014, you and your company, with
22 the assistance of your prior attorneys, you hired an ESI
23 vendor.

24 Do you understand that?

25 A. Yes.

1 Q. What's the name of that company?

2 A. I believe 4Discovery.

3 Q. Were they ever called "Elijah"?

4 A. No.

5 Q. Was there ever another company that you contacted called
6 "Elijah"?

7 A. My previous attorneys in May -- April, May, June,
8 somewhere in that range of this year, reached out to a company
9 called "Elijah," I believe.

10 Q. And that's -- as you recall, that's the first time you
11 ever spoke to an ESI vendor or heard of one called "Elijah"?

12 A. To the best of my knowledge, yes.

13 Q. Can I ask that H Exhibit, Leavens Strand -- I called it
14 the "HK" -- Holland & Knight -- Exhibit 13, but it is the
15 Leavens Strand Exhibit 13 be displayed.

16 THE COURT: Give me a moment.

17 MR. DAVIS: Your Honor, just for housekeeping, I move
18 P-66 into evidence.

19 THE COURT: Any objection to P-66?

20 MR. SALAM: No objection.

21 THE COURT: All right. That will be admitted.

22 (Plaintiff's Exhibit 66 was offered and received in
23 evidence.)

24 THE COURT: Hold on. I still do old school.

25 Okay. It is admitted.

1 And then you said you call it the Holland & Knight
2 exhibit, and it is 13, you said?

3 MR. DAVIS: Yes.

4 THE COURT: Okay. It is up on the screen. Let's use
5 that.

6 Do you have that in front of you, Mr. Duke?

7 THE WITNESS: I do, your Honor.

8 THE COURT: Okay. Go ahead.

9 BY MR. DAVIS:

10 Q. And I will ask you to take a look at the second page of
11 what is displayed in front of you and identify this as
12 LS Exhibit 13.

13 Look at the second page. I will ask you -- this is
14 an e-mail string, right, so you go to the last page to read
15 forward, right?

16 A. Yes.

17 Q. Do you understand that, Mr. Duke?

18 A. Yes.

19 Q. Okay. And you recognize this as an e-mail string?

20 A. Yes.

21 Q. And does this refresh your recollection as to
22 communications or hiring an ESI vendor named "Elijah"?

23 A. I don't believe we hired them. I believe we hired
24 4Discovery. I don't know if we were getting quotes. I have
25 no idea what this is.

1 Q. Fair enough.

2 And this is in November of 2014?

3 A. Yes.

4 Q. And this is an e-mail communication between you and one of
5 your prior attorneys, Ms. Liberman?

6 A. Yes.

7 Q. Is that right?

8 A. Yes.

9 Q. Okay. Do you recall getting this e-mail?

10 A. I'm looking at it. I don't recall it. But, yes, I'm
11 looking at it. So yes.

12 Q. Any doubt in your mind that this e-mail made its way from
13 her computer to your computer and you read it?

14 A. No, I believe that I read it.

15 Q. Okay. And if you look at the top of the second page, it
16 says: "Brent, See Andy's -- from Elijah's -- response below."

17 Do you understand that?

18 A. Yes.

19 Q. And you have no recollection of talking about an outside
20 vendor named "Elijah" at that time?

21 A. We were, as I said, probably getting quotes. So, no, I
22 wouldn't remember the company that we didn't choose five years
23 ago, no.

24 Q. All right. And look at the first page of this.

25 Do you recall writing back to Ms. Liberman?

1 A. I'm reading it. That's my writing. I don't necessarily
2 recall it, but --

3 Q. Okay. And what's the date of your e-mail from your Yahoo!
4 account to Ms. Liberman?

5 Is that right?

6 A. Monday, December 1st, 2014.

7 Q. Yes.

8 And was that your --

9 THE COURT: Let's pause for a second.

10 You said that's your writing. You mean the
11 handwriting that's on there?

12 THE WITNESS: No, no, that's the way I would write an
13 e-mail.

14 THE COURT: Because there is handwriting on the
15 document.

16 THE WITNESS: Yes.

17 THE COURT: I just want to clarify the record.

18 Okay. Go ahead.

19 BY MR. DAVIS:

20 Q. And that was your practice, was to use your main e-mail
21 account, your yahoo.com account, when communicating with your
22 attorneys in 2014?

23 A. Sometimes.

24 Q. And the times when you didn't, which one did you use?

25 A. Either the bduke@21centurysmoking.com or the

1 support@21centurysmoking.com.

2 Q. So those are the three e-mail accounts that you were using
3 to communicate with your prior attorneys?

4 A. Yes.

5 Q. And that would be the same for 2012, as for 2013, and
6 2014; is that right?

7 A. It would be the same until today. Those are the three
8 e-mails I use.

9 Q. Okay. And you authorized the disclosure of this document
10 that's being displayed here in open court as LS Exhibit 13; is
11 that right?

12 A. I don't know exactly what that means, I authorized.

13 Q. Did you ever object to anyone producing this to the
14 Plaintiffs in this case?

15 This is a conversation between you and your
16 attorneys, right?

17 A. Yes.

18 Q. And we have it. We have a communication between you and
19 your lawyers about your representation in this case.

20 Do you understand that?

21 MR. SALAM: Your Honor, I will object,
22 attorney-client privilege, but, again, subject to the -- we
23 are not objecting as to this document, but we will object, if
24 appropriate, when the time comes to express our -- what we
25 believe is a limited waiver --

1 THE COURT: Okay.

2 MR. SALAM: -- of the attorney-client privilege for
3 matters unrelated to this alleged discovery misconduct.

4 THE COURT: Okay. So the foreshadowed objection is
5 going to be foreshadowed-ly overruled.

6 MR. SALAM: Thank you, your Honor.

7 THE COURT: You're welcome.

8 MR. DAVIS: Do you understand my question?

9 THE COURT: He is saying he got this document, and it
10 is your attorneys. Did you know that the document was going
11 to be turned over to opposing counsel?

12 THE WITNESS: I mean, I read it before. I'm sure
13 they had it. So I have no idea. I mean, I guess my attorney
14 probably saw it. I didn't ever see it until I saw it in that
15 binder. So I don't know how to exactly answer that I
16 authorized it.

17 THE COURT: So you saw it in the binder of the
18 exhibits that were going to be used today?

19 THE WITNESS: Yes, yes.

20 THE COURT: Okay.

21 THE WITNESS: So I'm not sure if that is authorizing
22 it, but I did see it. You have it.

23 BY MR. DAVIS:

24 Q. Okay. And so LS Exhibit 13, that's on your screen, is
25 talking about making copies of four hard drives, right?

1 A. Yes.

2 Q. And before June of 2018, that's the only time that copies
3 of those four computer hard drives was ever made, right?

4 A. Yes.

5 Q. And do you remember the date when those copies were made?

6 A. I do not.

7 Q. Do you recall if it was in December of 2014, about the
8 time of this e-mail that is LS Exhibit 13 that's in front of
9 you?

10 A. Late December -- late 2014 at some point. I don't
11 remember the exact time.

12 Q. Okay. And --

13 A. Or maybe even early 2015. I know it was after I moved to
14 California, but I don't know.

15 Q. When did you move to California?

16 A. September of 2014.

17 MR. DAVIS: Plaintiffs move LS-13 into evidence.

18 THE COURT: Any objection?

19 MR. SALAM: Object, attorney-client privilege.

20 THE COURT: Overruled. It's admitted.

21 (Leavens Strand Exhibit 13 was offered and received in
22 evidence.)

23 BY MR. DAVIS:

24 Q. In January of 2019, you had -- let me back up.

25 So ultimately, you know the name of the ESI vendor

1 that your prior attorneys hired, right?

2 A. I think so, 4Discovery. I don't think we used Elijah.

3 Q. Okay. And you know or somehow you were involved in the
4 process of them making a copy of the data on four computers
5 that were in your possession, right?

6 A. Yes.

7 Q. And you are aware that in January of this year, your
8 vendor, 4Discovery, confirmed that the data it captured from
9 those computers is lost and can't be recovered?

10 Are you aware of that?

11 A. I have been told that, yes.

12 Q. Could you repeat your answer?

13 A. I have been told that, yes.

14 Q. And who told you that?

15 A. My previous attorneys, I believe.

16 MR. DAVIS: Okay. And can we have LS-14 displayed,
17 please?

18 BY MR. DAVIS:

19 Q. Showing you now what has been marked as LS Exhibit 14,
20 produced by the attorneys -- your prior attorneys, have you
21 ever seen this before?

22 A. No.

23 Q. Is this the first time you are seeing it right now, as you
24 are sitting in court?

25 A. I didn't see it previously. I believe I saw it in

1 preparing for this today.

2 Q. I'm sorry. Could you --

3 A. I did not previously ever see it. I saw it, I believe, in
4 a binder preparing for today.

5 Q. Prior to your preparation for the hearing with your
6 attorneys, who showed you this document, you have never seen
7 it before?

8 A. No.

9 THE COURT: All right. When did you see it in
10 preparation for today's hearing, if you recall?

11 THE WITNESS: A couple days ago, I believe.

12 THE COURT: Okay. That's fair.

13 And where?

14 THE WITNESS: At the office of Mr. Salam.

15 THE COURT: Okay. And was it your understanding at
16 the time you were reviewing these documents in preparation for
17 your testimony in this hearing?

18 THE WITNESS: Yes.

19 THE COURT: Okay. Thank you.

20 BY MR. DAVIS:

21 Q. And do you understand what this document is?

22 A. It looks like a meeting with me. No, I don't know exactly
23 what it is.

24 Q. Do you recall meeting with any one of your prior attorneys
25 on or about May 29, 2014?

1 A. No.

2 Q. And do you recall meeting on or about May 29, 2014, where
3 any of your lawyers confirmed not removing data as is stated
4 on the first line of this document?

5 A. I don't know. I don't understand the question.

6 Q. Okay. Directing your attention to the second bullet
7 point, can you read what that is on the document?

8 A. Yes.

9 Q. Okay. What does it say?

10 A. "What other custodians? Wife?" A sign pointing to
11 "Laurie."

12 "Use GoDaddy, Yahoo, bduke, support@."

13 "Rob hasn't worked in two years."

14 "ODesk" to "People help with website."

15 "Steve Spraker has done some invoicing for stores in
16 Ohio."

17 "Accounting, Excel spreadsheet."

18 Q. Good. I think you read it better than I did the first
19 time I read it.

20 On the right, after the word "Wife?", it says
21 "Laurie," right?

22 A. Yes.

23 Q. And "Use GoDaddy," do you know what that means?

24 A. I'm assuming it's where the e-mail is stored, is GoDaddy.

25 Q. Right.

1 And it says "Yahoo." That's your other e-mail
2 account, right?

3 A. Yes.

4 Q. And under it, it says "bduke" and "support."

5 I mean, these are the e-mail accounts you have just
6 told us and testified those were your primary e-mail accounts,
7 right?

8 A. Exactly.

9 Q. Right?

10 And I'm representing to you we have been told this is
11 Ms. Liberman's/your prior attorney's handwritten notes about a
12 meeting she had with you, right?

13 A. I have no idea. You are telling me it was Ms. Liberman.

14 Q. I'm going to represent to you -- she is expected to
15 testify about this, and she is going to be called as a
16 witness -- she is saying she spoke to you on May 29, 2014.

17 Do you understand that?

18 A. I believe it, yes. I would have told them everything.

19 Q. And you would have told her about your e-mail accounts,
20 right?

21 A. Of course, yes.

22 Q. So on or about this date, she knew in a meeting with you
23 that you had those e-mail accounts and you used them, right?

24 MR. SALAM: Objection, your Honor, foundation.

25 THE COURT: I will sustain that as to this witness's

1 knowledge of her mental state. If there is a statement as to
2 what was said in a conversation, that would be one thing, but
3 I will sustain the objection.

4 BY MR. DAVIS:

5 Q. Do you recall if you met Ms. Liberman face-to-face on
6 May 29, 2014?

7 A. I met Ms. Liberman face-to-face on numerous occasions. So
8 I can't tell you, years ago, what days I met with her.

9 Q. Do you remember a meeting where she said anything to you
10 about removing data, as suggested in the first line of this
11 document?

12 A. I was told from the very first meeting ever with their
13 firm to not remove any data. So I don't know how they are
14 confirming I wasn't removing data. That seems consistent with
15 everything I was told and what I did.

16 Q. Right.

17 And so removing data, what does that mean to you?

18 A. It is her notes. I have no idea what she means by that.

19 Q. And in that meeting, she doesn't note anything in here
20 about telling you about copying your data or backing it up,
21 right?

22 A. Not in these specific notes. No, I don't see anything.

23 Q. Okay. And you see under the fifth item there, it says
24 "settlement"?

25 A. Yes.

1 Q. Do you recall having meetings with Ms. Liberman where you
2 spoke about settlement in May of 2014?

3 A. I don't recall.

4 Q. Do you remember any conferences with Ms. Liberman in May
5 of 2014 where you talked about experts in the case?

6 A. I do not recall. I don't recall this meeting. I don't
7 recall any of this stuff.

8 Q. I'm going through it to see if anything in the notes
9 prompts your memory.

10 A. Okay.

11 MR. DAVIS: Can I go to the second page, please?

12 BY MR. DAVIS:

13 Q. The seventh item, can you read that?

14 A. "Prepare to be deposed."

15 Q. Do you recall a meeting in May of 2014 where you discussed
16 that with Ms. Liberman?

17 A. No.

18 Q. Do you know if you ever had any e-mails with Ms. Liberman
19 regarding not removing data?

20 A. I do not recall.

21 Q. Do you ever recall any e-mails or conversations with her
22 where she said preserve all your data and back it all up?

23 A. I recall talking to Mr. Leavens and him telling me to
24 preserve all my data. I do not necessarily remember
25 specifically discussing it with Ms. Liberman.

1 Q. Okay. And at the time you told her about your e-mail
2 accounts, did you give her access to those e-mails accounts,
3 give her your credentials to access the accounts?

4 A. I don't recall. I offered my credentials to my lawyers on
5 multiple occasions. I don't recall which times they took them
6 and which times they didn't.

7 Q. So let me unpack that a little bit.

8 Mr. Leavens was one of your prior attorneys that gave
9 you instructions about preserving and backing up data, right?

10 A. Yes.

11 Q. And he said back up your data?

12 A. He said, "Preserve the data, keep all of your data."

13 Q. Got it.

14 So he never told you to copy it, right?

15 A. I had a meeting with all of the attorneys, including, I
16 believe, yourself probably was on the meeting where we
17 discussed copying data, and that's when I got the Carbonite
18 account. So up until then -- that was the first time I
19 started copying my data is with Carbonite.

20 So it is whenever everyone had discussed how they
21 were preserving, like copying data, I guess. That's when I
22 started copying data with Carbonite. So whenever that meeting
23 was. So that was my lawyers. That was also your side. That
24 was a larger meeting on some type of a conference call.

25 Q. You understood that that was a court-ordered meeting,

1 right? You were required by the Judge, Magistrate Johnston,
2 to attend that?

3 A. I believe, yes.

4 THE COURT: Yes.

5 THE WITNESS: I was there.

6 BY MR. DAVIS:

7 Q. Right.

8 You were on the phone, right?

9 A. No, I was in person.

10 Q. Oh, at your attorneys' offices?

11 A. Yes.

12 Q. And they wouldn't allow you to speak in that call, right?

13 A. I don't recall.

14 Q. You don't recall them telling you not to talk on the
15 conference call, and they would mute the call and then speak
16 to you about your answers?

17 You don't recall that?

18 A. I don't recall the meeting. The only thing I recall from
19 that meeting is I went home and set up Carbonite. That's what
20 I recall from that meeting.

21 Q. All right. And prior to that time, none of your prior
22 attorneys ever told you to preserve any of your data prior to
23 that meeting?

24 MR. SALAM: Objection, your Honor.

25 MR. SMITH: Objection to the form, your Honor.

1 THE COURT: Hold on one second. We have
2 got -- Mr. Salam, stand up and make your objection first.

3 MR. SALAM: Objection, your Honor, that misstates his
4 testimony.

5 THE COURT: Okay. And, Mr. Smith?

6 MR. SMITH: It was the same objection, your Honor.
7 He has testified repeatedly that he was told to preserve.

8 THE COURT: Okay. Why don't you rephrase the
9 question.

10 BY MR. DAVIS:

11 Q. When was the first time you were told to preserve data by
12 any of your prior attorneys?

13 A. The very first time I met with Mr. Leavens, he told me to
14 preserve everything.

15 Q. And tell me specifically what he told you in that
16 conversation and when it was?

17 A. He said, "We are now working together. We now have
18 attorney-client. You are now my client." He sent me the
19 agreement, the retainer agreement. We did a contract, and he
20 said, "Now that we are working together, you need to make sure
21 you preserve every single piece of data. You cannot delete
22 things. Do not delete anything."

23 Q. Did he tell you anything else?

24 A. He probably told me lots of things. That's what I
25 remember about that specifically.

1 Q. Got it.

2 And when you say he told you lots of other things,
3 I'm trying to understand what he told you about your
4 obligations in connection with ESI.

5 You said he told you to preserve it and not to delete
6 anything; is that right?

7 A. Yes.

8 Q. Did he tell you to do anything else?

9 A. That's what I recall.

10 Q. Okay. And that was when you first met with him in 2012?

11 A. Yes, I believe so.

12 Q. And did you ever have the same conversation with
13 Mr. Strand at that time?

14 A. I do not believe I have ever spoken with Mr. Strand.

15 Q. And did you ever have that same conversation with
16 Ms. Liberman?

17 A. I don't recall.

18 Q. And do you ever recall receiving any e-mail from
19 Mr. Leavens outlining his advice to you about preserving your
20 data and not deleting it?

21 A. I think it was verbal. He said it to me though.

22 Q. Okay.

23 A. I heard it. I understood it.

24 Q. And he didn't give you any instructions outside of
25 "Preserve it and don't delete it," right?

1 MR. SMITH: Objection, your Honor. He has testified
2 to a limited recollection of conversations. He has also
3 testified "He probably told me lots of other things." And now
4 we are trying to refine it down to this limited recollection,
5 when the witness has already expressed the limits of his
6 recollection.

7 THE COURT: That's good cross-examination, ain't it?
8 That's what you do in cross-examination.

9 Overruled.

10 MR. SMITH: I thought I would take a shot at a bad
11 question, your Honor.

12 THE COURT: Overruled.

13 We start big and go narrow.

14 THE WITNESS: Can you repeat the question, please?

15 MR. DAVIS: Sure.

16 Can I have that read back?

17 (Record read.)

18 THE WITNESS: No, that's not true.

19 BY MR. DAVIS:

20 Q. Okay. What other instructions did he give you?

21 A. I don't recall the entire conversation, as I stated.

22 Those are the things I do remember very specifically. Send
23 him a check for \$10,000 to sign the contract. I mean, there
24 was other things he told me. Those are the specific things I
25 remember with regards to what we are discussing today.

1 Q. And when your attorneys come out and ask you about your
2 recollection of this conversation, you will have nothing
3 further to add than what you have just told me?

4 A. I'm telling you what I remember from the conversation.

5 Q. And that's the sum total of what you recall from that
6 conversation; is that right?

7 A. It was probably a 20- or 30-minute meeting. That's what I
8 remember from that conversation.

9 MR. DAVIS: Okay. And we move HK-14 into
10 evidence -- oh, no, strike that. We will wait for that, your
11 Honor. Sorry.

12 BY MR. DAVIS:

13 Q. Did you -- when you said you offered your credentials for
14 your e-mail accounts to your attorneys, you mean Yahoo! and
15 your GoDaddy e-mail accounts, right?

16 A. Yes.

17 Q. And when was the first time you made that offer?

18 A. I don't even recall. I was constantly searching for
19 e-mails. So I, at times, would be, like, "Would you guys
20 rather search these yourself? Because this is a lot of stuff,
21 and I don't know exactly what you are looking for."

22 Q. And in all those instances, they asked you to do your
23 searches, and they never accessed and used your credentials;
24 is that right?

25 A. Yes, I do not recall if they ever took me up on the offer

1 of searching my e-mails.

2 Q. But you told them the e-mails were online and available
3 and accessible if they wanted to use your credentials to
4 access them?

5 A. Yes.

6 Q. When was the first time you told them that?

7 A. As I said, I do not recall.

8 Q. Would it have been at or about the time you started
9 searching for e-mails in the case that were going to be
10 produced or used in the case?

11 A. Probably. I would guess it would have been in
12 2013 -- 2012, 2013 window would be my best guess.

13 Q. Yes.

14 Do you remember in 2013 searching for e-mails to use
15 in connection with some court proceedings and motions that
16 were filed?

17 A. Yes.

18 Q. Do you remember that?

19 A. Yes.

20 Q. Do you remember that first proceeding about the
21 preliminary injunction?

22 Do you recall that in 2013?

23 A. No.

24 Q. You don't recall Plaintiffs -- there was a motion filed
25 about Plaintiff's trademark, 21 Century Smoke, being in the

1 metadata of your website?

2 A. Oh, yes, I do remember that.

3 Q. Do you remember doing searches for e-mails at that time?

4 A. I believe I did do searches for e-mails at that time, yes.

5 Q. And before that, when you first met with your attorneys,

6 you did searches for e-mails and provided them documents,

7 right?

8 A. Yes.

9 Q. And did you -- and those were from your Yahoo! and GoDaddy
10 accounts?

11 A. Yes.

12 Q. All right. And do you recall if, at that time, you
13 offered your credentials to them for them to review and look
14 at your e-mails independent of you?

15 A. As I have stated before, I do not recall when I offered
16 it. I just remember there were times when the searches would
17 become cumbersome, and I would ask if they wanted to do it
18 themselves.

19 Q. Got it.

20 And they could have done that because these
21 are -- all your e-mails are web-based, right?

22 They are in the cloud, right?

23 A. Yes, yes.

24 Q. And if they had the credentials, they could just log in
25 from any computer and see the e-mails, right?

1 A. Yes.

2 Q. And you offered those credentials to them at different
3 times?

4 A. Yes.

5 Q. Okay. And at any time, did Tom Leavens ever run searches
6 in your online e-mail accounts, Yahoo! and GoDaddy,
7 independent of you?

8 A. Not to the best of my knowledge.

9 Q. What about any of your other prior attorneys, any of them?

10 A. As I have stated, I don't recall if they ever took me up
11 on that offer. I just don't remember. I know I offered it.
12 I can't remember if they ever did any searches.

13 THE COURT: I'm going to pause you right there.

14 Did you offer your credentials to search the e-mails
15 to Mr. Stamatis, if you recall?

16 THE WITNESS: At what time frame?

17 THE COURT: Any time.

18 THE WITNESS: Yes.

19 THE COURT: When?

20 THE WITNESS: 2018 for sure.

21 THE COURT: Okay. Did you offer your credentials to
22 search your e-mails to Mr. Shonder at any time?

23 THE WITNESS: I don't recall.

24 THE COURT: Okay. All right. Go ahead.

25 MR. DAVIS: Thank you, your Honor.

1 I'm going to turn your attention now to Exhibit 65,
2 if I could have that brought up.

3 BY MR. DAVIS:

4 Q. Plaintiff's Exhibit 65, which is Docket 288, dated
5 January 22nd, 2019, is now displayed in front of you.

6 Can you look at that, Mr. Duke?

7 A. Yes.

8 Q. Do you recognize it?

9 A. Would you please scroll down?

10 Can you go back up?

11 And could you go back down again? I'm sorry.

12 And what's the question?

13 Q. Well, continue on. There is the paragraph says: "See
14 attached letter," and this is Page 4 of 6 of Exhibit 65.

15 Do you see that in front of you now, the
16 letter -- it's a letter from 4Discovery; is that accurate?

17 MR. SALAM: Can the witness have a chance to read it,
18 please?

19 (Brief pause.)

20 THE WITNESS: Yes.

21 BY MR. DAVIS:

22 Q. And when was the first time you saw this letter?

23 A. Right now. I don't remember seeing this letter.

24 Q. Did anyone ever tell you anything about the problem that
25 4Discovery had with retrieving the data that it copied from

1 your four hard drives?

2 You are aware of that, right?

3 A. Previously, as I previously said, yes.

4 Q. Do you remember when you found out about that?

5 A. I do not.

6 Q. And this letter that was filed with the court, did your
7 attorneys share it with you before today or before your
8 preparation for this hearing?

9 A. It does not look familiar to me. I mean, I may have seen
10 it and not known what it was about.

11 Q. You don't know what it was about?

12 A. I may have seen it and not understood what the -- what I
13 was going to be asked about it or what the purpose of it was.
14 So I may have just gone over it. If this was in the binder
15 that I saw, I don't recall seeing it.

16 Q. All right. This is a -- I will represent to you it is a
17 report to the court that your attorneys filed, with this
18 letter, saying they were unable to retrieve the hard drive
19 data that they had copied earlier in the case.

20 You understand that, right?

21 A. I believe you, yes.

22 THE COURT: He said that a couple times now.

23 BY MR. DAVIS:

24 Q. Okay. And the page that's on the screen right here, those
25 are the four hard drives that were imaged. It is numbered

1 one, two, three, and four towards the bottom of the page?

2 A. Yes.

3 Q. So that's Laurie's computer, right?

4 A. Yes.

5 Q. Rob Hough's computer?

6 A. Yes.

7 Q. Your computer?

8 A. Yes.

9 Q. And Bryan Kos's?

10 Am I saying that name right?

11 A. Yes.

12 Q. Is that his full name?

13 A. Bryan Scott Kos.

14 Q. Bryan Scott Kos.

15 K-o-s?

16 A. Yes.

17 Q. And he was an employee of your company?

18 A. Yes.

19 Q. And he had a computer at your office?

20 A. Yes.

21 Q. Okay. And you understand from this report that the data
22 from your four hard drives no longer exists, right?

23 A. No longer exists with 4Discovery, yes.

24 Q. That's right.

25 And it is gone forever, right?

1 A. No, it is not gone forever.

2 Q. Well, the images that they took of your computers in 2014,
3 right, is gone forever? The data that they lost is gone
4 forever?

5 A. The data that they lost is not gone forever, no.

6 Q. Where is it? Do you have it?

7 A. On these same computers.

8 Q. On the same computers.

9 But the image they took on December 9th of 2014, and
10 made copies of your hard drives, right?

11 A. Okay.

12 Q. And that data is gone, right? That's what they are
13 reporting to the court here?

14 Do you understand that?

15 A. This is prior to recopying them. You are saying right now
16 the data is lost. Obviously, the data is not lost if the copy
17 now is the exact same as the copy then. The data is not lost.

18 Q. So, in your mind, you can copy data any time, and it never
19 changes, and it doesn't matter; is that right?

20 A. I did not just say that.

21 Q. Okay. So I'm asking you a question. You hired an ESI
22 vendor called 4Discovery, right?

23 A. Yes.

24 Q. They took copies of your four work computers in December
25 of 2014, right?

1 A. Yes.

2 Q. That data was set aside, right?

3 A. Yes.

4 Q. And it was used in this case for searching and production
5 of documents, right?

6 A. Yes.

7 Q. When documents were to be produced, they didn't come back
8 to your house and search your computers again, right?

9 A. Of course not.

10 Q. Right.

11 So it was an important step in the process of this
12 case, right?

13 A. Absolutely, yes.

14 Q. Yes.

15 And what I'm asking you is you understand that all
16 the data that this company captured from your hard drives in
17 December of 2014, that they captured and made copies of, no
18 longer exists.

19 Do you understand that?

20 A. Yes, their copy does not exist, yes.

21 Q. That's right.

22 A. Yes.

23 Q. Their copy?

24 A. Yes.

25 Q. The forensic copy they made, right?

1 A. Yes.

2 Q. It is gone forever, right?

3 A. Yes.

4 Q. Okay. And that's the same for your Yahoo! Messenger chat
5 account, right, it is gone forever?

6 A. They discontinued the program, so, yes, it is gone.

7 Q. And it is gone forever, right?

8 A. Yes.

9 MR. SALAM: Your Honor --

10 BY MR. DAVIS:

11 Q. And it was something you used in connection with your
12 business, right?

13 A. A long time ago, yes.

14 Q. And what's a long time ago?

15 A. Ten years.

16 Q. Ten years ago?

17 A. Yes.

18 Q. You used Yahoo! Messenger in 2009, right?

19 A. Yes.

20 Q. And that was in connection with your communications with
21 people like Webrecsol and Kirti Saraswat?

22 A. Yes.

23 Q. And you used it to communicate with them because, what,
24 they are in India, right? They are in a different time zone,
25 and you are communicating by chat?

1 A. E-mail and chat, yes.

2 Q. And why would you use chat?

3 A. For more instant responses.

4 Q. And you used this -- do you remember what your login
5 credentials were, what your name was for your Yahoo! Chat
6 messenger account?

7 A. Brent Duke.

8 Q. Just Brent Duke?

9 A. Same as my e-mail, yes.

10 Q. Yes.

11 And at no time, right, did you ever copy all of the
12 data that was in your Yahoo! Messenger chat account; is that
13 right?

14 A. Not all of it, no.

15 Q. And at no time did you ever preserve all of the data that
16 was in your Yahoo! Messenger chat account, right?

17 A. Correct.

18 Q. Okay. And at no time did you or anyone on your behalf
19 ever search the Yahoo! Messenger chat data for responsive
20 documents in this case, right?

21 A. Correct.

22 Q. Now, I'm going to ask you the same questions for an
23 application called Gtalk. Are you familiar with that?

24 A. I believe it is the Gmail instant messenger program, yes.

25 Q. Okay. And that's also another instant messaging

1 application you used in connection with your business, right?

2 A. It would have been a lot more rare than the Yahoo! one. I
3 used the Yahoo! one mostly. I very rarely use my Gmail
4 account.

5 Q. So you used Gtalk in connection with your business, right?

6 A. I believe so.

7 Q. Do you remember when you used it in connection with your
8 business?

9 A. I do not. I don't actually recall any conversations on
10 Gtalk. I do recall seeing an e-mail that said something about
11 Gtalk.

12 Q. Right.

13 We move Plaintiff's Exhibit 65 into evidence, your
14 Honor.

15 MR. SALAM: No objection, your Honor.

16 THE COURT: All right. 65 will be admitted.

17 (Plaintiff's Exhibit 65 was offered and received in
18 evidence.)

19 THE COURT: Are you moving to a different subject
20 matter?

21 MR. DAVIS: Yes.

22 THE COURT: Okay. It is almost straight-up noon. We
23 will take a break.

24 All right. You are still under oath. Don't talk to
25 anybody about your testimony.

1 Let's come back at 1:15.

2 Mr. Holevas can give you recommendations on where to
3 go, unless you brought your lunch, like I did.

4 (Recess taken.)

5 THE CLERK: Recalling 12 CV 50324, DR Distributors,
6 LLC v. 21 Century, Inc.

7 THE COURT: All right. Mr. Duke, why don't you have
8 a seat again.

9 And, Mr. Salam, a question for you on attorney-client
10 privilege waiver. I know that we have kind of touched on it,
11 danced around it a little bit. Are we going to have a 502(a)
12 issue on subject matter waiver in this case?

13 MR. SALAM: Can you educate me on 502(a), your Honor?
14 I apologize.

15 THE COURT: Sure.

16 MR. SALAM: My trial attorney is unavailable.

17 THE COURT: Sure.

18 You know, it is not that long, but, boy, it can be
19 complicated. We will talk about 502(a), not 502(b).

20 502 --

21 MR. SMITH: Your Honor, I could offer you a nickel's
22 worth on that. The problem is --

23 THE COURT: Hold on. Hold on. Hold on.

24 MR. SMITH: Sorry, Judge.

25 THE COURT: You just said the magic words, and so I

1 just want to make sure, if we are going to have an issue,
2 whether we can flesh it out.

3 502: "The following provisions apply, in the
4 circumstances set out, to disclosure of a communication or
5 information covered by the attorney-client privilege or work
6 product doctrine, (a) disclosure made in a federal proceeding
7 or to a federal office or agency; scope of waiver" -- that's
8 all in bold -- "When the disclosure is made in a federal
9 proceeding or to a federal office or agency and waives the
10 attorney-client privilege or work-product doctrine, the waiver
11 extends to an undisclosed communication or information in a
12 federal or state proceeding only if: (1) the waiver was
13 intentional; (2) the disclosed or undisclosed communication or
14 information concern the same subject matter; and (3) they
15 ought in fairness to be considered together."

16 That's 502(a).

17 Go ahead, Mr. Smith. You want to chime in?

18 MR. SMITH: All I was going to say is the problem
19 with these issues always is the definition of "subject
20 matter," and there is not a lot of good case law. We have
21 certainly been talking about the discovery issues raised by
22 this motion, so one would think a fence could be put around
23 this one pretty clearly, but you are correct that it is a
24 bucket of thorns whenever you start deciding what the subject
25 matter is and how far a subject matter waiver goes.

1 MR. SALAM: So, your Honor, may I?

2 THE COURT: Sure.

3 MR. SALAM: And thank you for allowing me the time to
4 review the rule.

5 My goal was, obviously, I wanted to allow Plaintiff's
6 counsel, as well as former defense counsel, as well as us,
7 current defense counsel, to explore the communications related
8 to discovery and the sanctions issues in this matter, okay?

9 THE COURT: Okay.

10 MR. SALAM: Because it is, obviously, important to
11 all parties involved, obviously, and to your Honor.

12 I wanted to, to the extent possible, under applicable
13 law and case law, avoid, if possible, waiving the privileges
14 to other communications, attorney-client communications,
15 related to the trademark case, the merits, things unrelated to
16 this discovery issue.

17 THE COURT: We were just talking about that.

18 Go ahead.

19 MR. SALAM: So that is what I was attempting to
20 express as far as a limited waiver.

21 THE COURT: Got you.

22 MR. SALAM: Okay.

23 THE COURT: All right. And go ahead. I don't want
24 to interrupt you.

25 MR. SALAM: That's my explanation.

1 THE COURT: That's where I thought you were going,
2 and then that leads into what we were mumbling to each other
3 about walking down the stairs. We were both talking about,
4 "Well, what is the subject matter," and then Mr. Smith chimed
5 in with "bucket of thorns." Was that the metaphor?

6 MR. SMITH: Yes. I think that is a very good
7 metaphor.

8 THE COURT: Hold on one second.

9 MR. SALAM: I just wanted to preserve the record.

10 THE COURT: Sure. Okay.

11 Well, so far, it has all been issues relating to this
12 discovery issue, and the subject matter -- clearly, the
13 subject matter of the motion.

14 But if you give me a moment.

15 Hanley is up on Tuesday or Thursday?

16 Oh, come on, Hanley is up -- or *McCullough v. Hanley*
17 is up this Thursday?

18 THE CLERK: Tuesday, your Honor.

19 THE COURT: Well, that explains it. It is in the
20 afternoon.

21 Just so you know, I'm looking at a case called
22 *McCullough v. Hanley*. It is my attempt to figure out 502(a),
23 an alleged wrongful conviction of Mr. McCullough relating to
24 the murder of a child back in the '50s because those are the
25 kinds of cases I get, and I thought I had a discussion of what

1 subject matter because it is a little messy.

2 Waiver of subject matter. Hold on. I might have
3 dodged it.

4 "The case law addressing whether communications
5 'concern the same subject matter' is not particularly helpful,
6 probably due to the fact-specific nature of the analysis.
7 Indeed, some case law is reminiscent" -- God, I'm such a
8 jerk -- "Indeed, some case law is reminiscent of the
9 less-than-specific guidance found in Palms 37:27, 'Avoid evil,
10 do good, and live forever.'

11 "For example, in *Yarberry v. Gregg Appliances*, the
12 court noted that subject matter can be broadly or narrowly
13 defined, but ultimately a waiver must be based upon the facts
14 and guided by fairness. While recognizing that the scope of
15 the 'same subject matter' has not been precisely defined, some
16 courts caution that same subject matter should be narrowly
17 interpreted."

18 Yes, it is going to be tough to wade through. All
19 right. So that is there for whatever value it is.

20 All right. So we have got that covered. I
21 appreciate that, Mr. Salam.

22 MR. SALAM: Thank you, your Honor.

23 THE COURT: Mr. Davis, go ahead.

24 MR. DAVIS: Thank you, your Honor.

25

1 BY MR. DAVIS:

2 Q. Mr. Duke, before the lunch break, we were talking about
3 four computers that were imaged by an ESI vendor.

4 Do you recall that testimony?

5 A. Yes.

6 Q. And those four computers were computers that you used at
7 your office or with your business, right?

8 A. Correct.

9 Q. And since the time they were imaged the first time by
10 4Discovery, you continued to use them in your business, right?

11 A. Correct.

12 Q. And they were in the office of your business, not in the
13 garage?

14 A. Those four, yes.

15 Q. And they were turned on?

16 A. Yes.

17 Q. And they were connected to the Internet?

18 A. All but one, yes.

19 Q. Okay. Which one was it?

20 A. I would have to see that list again.

21 Do you have that list? Can you put the list up for
22 me?

23 Q. What about the list would tell you whether it is connected
24 or not, the list of the --

25 A. Brand.

1 Q. What's that?

2 A. The brand that it is.

3 Q. The brand of the computer?

4 A. Yes, if I could look at that list, I could figure it out,
5 at least --

6 Q. It's the Exhibit, I believe, 65.

7 A. One of those two last ones has not been plugged in.

8 Q. You see in front of you, I think it is, Exhibit 66?

9 A. Yes. I saved the computer, but it was no longer being
10 plugged in. One of those last two is one of the ones that was
11 searched.

12 Q. One of the last two?

13 A. Yes. They both say the same thing, but one of those last
14 two.

15 Q. Like where on the list? What are they called? Just read
16 it.

17 A. Acer Aspire DT. Acer Aspire DT.

18 Q. All right. And one of those was previously imaged by
19 4Discovery, and now it is just sitting there?

20 A. Exactly.

21 Q. Okay. And the other three are actively used in your
22 business? They are in your office?

23 A. My laptop is actively used and whatever one -- my wife's
24 computer is actively used. The other one is not.

25 Q. All right. And that has been continuously since 2014,

1 when they were imaged by 4Discovery?

2 A. Yes.

3 Q. And are they password protected computers?

4 A. Yes.

5 Q. And those three are connected to the Internet?

6 A. Those two.

7 Q. Sorry, those two?

8 A. Yes.

9 Q. And did you ever have any problems with viruses with any
10 of those machines?

11 A. I do not believe so.

12 Q. And as you sit here today, when you say you don't believe
13 so, did you ever have any virus problems with any of your
14 computers that you used in your business?

15 A. I don't recall ever having a problem. I don't remember if
16 my wife ever had a problem. Everything was backed up on
17 Carbonite. I mean, if we ever did have a problem, we would
18 have everything backed up, but I don't recall ever having any
19 problem myself. I'm not sure if she did.

20 Q. Okay. So you don't know if you ever lost any files to a
21 virus problem?

22 A. We didn't lose any files because it was backed up on
23 Carbonite. If we ever would have had a virus, it would have
24 been backed up, so we couldn't lose any files.

25 Q. And did you ever have an event where you had to restore

1 data from Carbonite because you had a problem on one of your
2 machines?

3 A. I have not. I'm not sure if my wife has.

4 Q. Other than the two of you, would there be anyone else that
5 would know about that?

6 A. No.

7 THE COURT: Hold on.

8 When were things backed up on Carbonite, though?
9 That wasn't until after that meeting, right? You had the
10 Carbonite -- Carbonite didn't come into play until there was
11 the meeting, or were you using Carbonite back in 2010?

12 THE WITNESS: No, no, no, whenever that meeting was
13 in 2014, whenever that was.

14 THE COURT: Okay. But before you had Carbonite?

15 THE WITNESS: No, we never had any viruses. We have
16 never lost any documents.

17 THE COURT: Okay. Go ahead, Mr. Davis.

18 MR. DAVIS: Thank you.

19 BY MR. DAVIS:

20 Q. And prior to Carbonite, you never had a virus problem; is
21 that right?

22 A. On my computer, no.

23 Q. And on your other machine that you are thinking of, which
24 one was that that had the problem?

25 A. Our website has had problems.

1 Q. Your website had problems. Describe that for me.

2 A. Just there were viruses on the website.

3 Q. How does that happen?

4 A. Someone hacks into your website and inserts information
5 that they want on the website.

6 Q. And when did that happen?

7 A. It happened on a few occasions.

8 Q. And how did they hack into your website?

9 A. I have no idea how hackers hack.

10 Q. Do they have to hack into your home computer to hack into
11 your website?

12 A. No, they would have to hack into my files on my GoDaddy
13 account.

14 Q. And that's the GoDaddy account is where your website is
15 hosted?

16 A. Yes.

17 Q. So they hack into your online account?

18 A. Yes.

19 Q. And that's where the files for your website are?

20 A. Yes.

21 Q. And you also have copies of those files on your computer,
22 your laptop?

23 A. Yes.

24 Q. Yes.

25 And did you ever get any viruses on the files that

1 were -- your website files on your laptop?

2 A. No.

3 Q. And do you still use Carbonite today?

4 A. Yes.

5 Q. And what was backed up on Carbonite?

6 A. Everything on my wife's computer, everything on my
7 computer.

8 Q. Okay. Just those two computers?

9 A. That's where everything from our company is, basically.

10 Q. Right.

11 And it didn't back up any of your e-mail accounts,
12 right?

13 A. No.

14 Q. Okay. And it didn't back up any of your websites that
15 were online, right?

16 A. No.

17 Q. And it didn't back up any of your web-based data, right?

18 A. No.

19 Q. And it didn't back up any of your Yahoo! Messenger chat,
20 right?

21 A. Unless it's saved on my computer, no, it just backs up the
22 files on the computers.

23 Q. And do you know if your Yahoo! Chat messenger was ever
24 backed up on your computer?

25 A. I don't believe so, no.

1 Q. I'm going to ask you the same questions that I was asking
2 you before the break about Yahoo! Messenger.

3 Right, that was the chat program that you used,
4 right?

5 A. Yes.

6 Q. I'm going to ask you the same questions about Gtalk. You
7 know what that is, right?

8 A. The Gmail messenger program, yes.

9 Q. Right.

10 And you used that in connection with your business,
11 right?

12 A. As I said before, I don't recall. I have seen e-mails
13 saying, "Let's talk on Gtalk," but I don't recall ever
14 actually using Gtalk. So I use it very rarely, if at all.

15 Q. Well, I guess my question is did you use it or not use it?

16 A. Yes.

17 Q. Okay. And you used it in connection with running your
18 business, right?

19 A. Possibly, yes. This is about ten to twelve years ago.

20 It's possible, yes.

21 Q. Right.

22 But that's the time period we are talking about,
23 right? Because this case started in 2012, but the discovery
24 period was 2009 through sometime in 2015 is the relevant time
25 period, right? You know that, right?

1 A. Yes.

2 Q. So I know it is a long time ago, but here we are, right?

3 A. Absolutely.

4 Q. So you used Gtalk, right, and you never saved any of the
5 data from Gtalk, right?

6 A. No.

7 Q. And it is an online messaging app, just like Yahoo!
8 Messenger chat?

9 A. Yes.

10 Q. And you never searched it for any responsive documents,
11 right?

12 A. Never would have thought to.

13 Q. Right.

14 And no one ever told you to do it?

15 A. No.

16 Q. And you never produced any of those documents in this
17 case, right?

18 A. No.

19 Q. And you are aware that that service has been discontinued,
20 right?

21 A. Yes.

22 Q. And so that data is gone forever, right?

23 A. I'm not sure about that.

24 Q. Explain.

25 A. I believe they did a bunch of research into Yahoo! and

1 that seems to be -- they don't seem to be able to get that. I
2 don't know if they have done that same amount of exhaustive
3 research into the Gtalk. I just don't know.

4 Q. Have you told your ESI vendor to look into your Gtalk
5 online chat messaging data?

6 A. I believe they would have done it. I don't know what they
7 are doing it.

8 Q. Did you tell them, the new vendor, that you used Gtalk as
9 part of your interview with them?

10 A. Yes.

11 Q. Okay. And is it your understanding they are investigating
12 that right now?

13 A. I believe so, yes.

14 Q. Okay. And are you aware of that data -- and when did you
15 report to them that you used Gtalk chat messaging?

16 A. I believe it came up in an e-mail somewhere, which
17 triggered my memory. I mean, this is something that I have
18 not used in forever, so I hadn't even thought about it.

19 Q. Right.

20 And those e-mails, those e-mails where you are
21 talking about Gtalk, came up when you produced your Yahoo!
22 e-mail account on June 1 of 2018, right?

23 A. Possibly, yes.

24 Q. Okay. I'm going to direct your attention to -- well,
25 before I go to that, is Gtalk referenced anywhere in this new

1 ESI vendor report that was filed with the court on
2 August 13th, 2019?

3 A. I'm not sure.

4 Q. And if it is not there, you didn't tell the ESI vendor
5 about it, right?

6 A. That is not true.

7 Q. Where else would they get the information for this report
8 other than you?

9 A. This is a partial report. This is not a completed report.
10 We discussed things after this report because we were working
11 on it. This was the date of the court hearing, so we had what
12 we had at the time. We have continued to work on it. They
13 are continuing to work on it until this day.

14 Q. And so do you have something in writing that you have
15 given the ESI vendor where you disclosed your use of your
16 Gtalk messaging account with them?

17 A. No, my lawyers have discussed it though.

18 Q. Okay. And do you know when they are going to report to
19 the court about their investigation of your Gtalk messaging?

20 A. You would have to ask my lawyers.

21 Q. All right. But if the service is discontinued and you
22 don't have the data, how are they going to get it?

23 A. Again, you would have to ask my lawyers. I have no idea.

24 Q. Can you say that again? I can't hear you.

25 A. Again, you would have to ask my lawyers. I have literally

1 no idea.

2 Q. So other than asking your attorneys for that information,
3 you don't have the data from your Gtalk messaging, right?

4 A. To the best of my knowledge, I do not have it. I don't
5 know if it is recoverable.

6 Q. Thank you.

7 I'm going to turn your attention to Plaintiff's
8 Exhibit 57, and I'm going to represent to you this was
9 attached to our motion for sanctions, and it is a collection
10 of e-mails that were produced for the first time on June 1,
11 2018.

12 Do you remember you testified you saw the motion?

13 A. Yes.

14 Q. Right.

15 And I'm going to go to Page 28 and 29 of this
16 exhibit.

17 MR. SALAM: Is the exhibit numbered?

18 MR. DAVIS: It's Exhibit 57.

19 MR. SALAM: I'm sorry. You said Page 28 and 29?

20 MR. DAVIS: It's Bates number 21C1001351-52.

21 BY MR. DAVIS:

22 Q. I ask you to look at the documents on the screen.

23 Can you tell me if you recognize it?

24 MR. SALAM: Your Honor, I'm trying to find it in the
25 hard copy that I have.

1 THE COURT: Okay. I know I have seen it. I have a
2 copy on my desk.

3 You said 57?

4 MR. DAVIS: Yes, Exhibit 57, Plaintiff's Exhibit 57.

5 THE COURT: Plaintiff's Exhibit 57?

6 MR. DAVIS: It is.

7 THE COURT: Do you have a hard copy?

8 MR. SALAM: I found it. It is Page 694 of 732. I
9 have got the exhibit.

10 THE COURT: Okay. It is Exhibit 57 is what I have.
11 All right.

12 Do you have it in front of you, Mr. Duke?

13 THE WITNESS: Yes, I do.

14 BY MR. DAVIS:

15 Q. Do you recognize that?

16 A. I recognize it from seeing it when I was searching for the
17 e-mails to give it to my attorneys.

18 Q. And when was that?

19 A. It was March of 2018, I believe.

20 Q. Okay. So this is -- do you recognize an e-mail that you
21 received from kirti@webrecsol.com on or about May 15, 2010?

22 A. Yes.

23 Q. And this is something you would have received from her in
24 the ordinary course of your business, right?

25 THE COURT: That is just a fancy lawyer way of saying

1 did you get this while you were working on your company from
2 her?

3 THE WITNESS: Yes, I'm not sure which company -- I'm
4 not sure what this is for, though, because it says "Re: Sports
5 Doctrine." So I am not sure if this is from a totally
6 different topic matter than 21 Century Smoking. So I'm unsure
7 what this is from.

8 BY MR. DAVIS:

9 Q. You are unsure.

10 You received an e-mail on May 15, 2010, from Kirti at
11 Webrecsol, right?

12 A. Yes.

13 Q. Okay. And you see in the first paragraph there --

14 A. Yes.

15 Q. -- she says: "Brent, I checked. There are so many files.
16 But how will I send all those to," and on and on, right?

17 And then the second to last line, can you read that?

18 A. "Can you please come online at Gtalk so that I can send
19 you through Gtalk, or do you want me to upload all these files
20 somewhere."

21 Q. So you are using Gtalk with Kirti at Webrecsol in 2010,
22 right?

23 A. It looks like for my Sports Doctrine website, yes.

24 Q. And that's a business you owned and operated and worked
25 with Kirti at Webrecsol on?

1 A. I mean, a business would be a stretch, but, yes, it is a
2 website she created for me.

3 Q. Okay. She created for you?

4 A. Yes.

5 Q. All right. And you worked on it with her? She was your
6 outside website consultant?

7 A. No, she built the website.

8 Q. She built it herself?

9 A. Yes.

10 Q. Okay. And how did she deliver it to you?

11 A. Put it on my GoDaddy account.

12 Q. Got it.

13 All right. And you can see in the message, a little
14 bit below, where it says: "Thanks, Kirti"?

15 Right below, it says on Friday, 14 May 2010. Do you
16 see that?

17 A. Yes.

18 Q. It says: "brentduke@yahoo.com wrote."

19 Can you read that?

20 A. "Script put in PHP files. Try opening on Firefox. So I
21 need clean files that I can keep on my PC as a backup. I was
22 never sent anything from you before. Thanks."

23 Q. And what is that "script put in PHP files"?

24 That is something you did based on your e-mail,
25 right?

1 A. Not necessarily.

2 Q. Okay. What are you saying there to her?

3 A. That it was in PHP files and that I don't have them.

4 Q. What is in the PHP files?

5 A. The Sports Doctrine website.

6 Q. And what are "PHP files"?

7 A. I don't know what that stands for. It's some type of web
8 language or something.

9 Q. Before you -- and you wrote that, right?

10 A. Yes.

11 Q. So when you wrote that, you must have known what PHP files
12 were to write it in your e-mail, no?

13 A. I mean, it is a type of web -- some type of like -- I
14 don't even know how to describe it. It is a way that websites
15 are built somehow with PHP files. I don't know exactly what
16 they are or how to describe them. I know that if you save a
17 file as a PHP, you can make it be on the web, but I don't know
18 a lot about it.

19 Q. So you know what it is. You just don't know the, like,
20 the Caltech definition of what a PHP file is?

21 Is that what you are trying to say?

22 MR. SALAM: Objection, your Honor, to the form of the
23 question.

24 THE COURT: I don't know what the reference to
25 "Caltech" is, other than isn't that the Big Bang Theory?

1 MR. DAVIS: Well, he went to Stanford University, so
2 I'm trying to give him a reference he might understand.

3 THE COURT: All right. So hold on a second.

4 Sustained. Just rephrase the question.

5 BY MR. DAVIS:

6 Q. So you know what a PHP file is, right? You just don't
7 understand like how the -- like the actual mechanics of how it
8 works, right?

9 A. I would say that is a fair assessment, yes.

10 Q. Okay. So it's like a word processor. You know how to use
11 the word processor, but you don't know how it actually works,
12 right?

13 A. I think that's not quite an accurate metaphor.

14 Q. Okay. All right. And this collection of e-mails that we
15 have marked as Plaintiff's Exhibit 57 are all e-mails that
16 were produced by you through your attorneys on June 1, 2018.
17 It's a collection of e-mails between you and Ms. Saraswat.

18 If I reviewed all of them with you, you would
19 identify you as the receiver or sender and her as the receiver
20 or sender on these e-mails, right?

21 A. Yes, that's correct.

22 MR. DAVIS: Your Honor, we move all these e-mails
23 that are collected at Plaintiff's Exhibit 57 into evidence.

24 THE COURT: All right. Hold on one second here.

25 Any objection?

1 MR. SALAM: No, your Honor.

2 THE COURT: All right. Plaintiff's Exhibit 57 will
3 be admitted.

4 (Plaintiff's Exhibit 57 was offered and received in
5 evidence.)

6 BY MR. DAVIS:

7 Q. All right. I want to turn your attention to something you
8 talked to the Judge about earlier called "auto-purge."

9 A. Okay.

10 Q. Do you understand that?

11 A. Yes, I do.

12 Q. You know what it is, right?

13 A. Yes.

14 Q. And the auto-purge setting was applied to all your company
15 GoDaddy e-mails accounts; is that right?

16 All the sent e-mail accounts; is that right?

17 A. Yes, I believe so.

18 Q. So it is not just bduke, it is not just support, but it
19 was every GoDaddy e-mail account that you had for your
20 company, that setting applied to, right?

21 A. I would assume so, yes. I checked the two, obviously,
22 that I used. Those are the two I made sure to switch because
23 I knew that I was using them, and I wanted to preserve that
24 data. I didn't go look through all the other ones because no
25 one was even using them at that time.

1 Q. At what time?

2 A. When I discovered it, I believe, was 2015, like June of
3 2015.

4 Q. Okay. And what's your understanding of how that setting
5 was applied to your account?

6 A. When you opened up the e-mail account, so you created the
7 account, it was automatically set to auto-purge after six
8 months, anything in the sent folder, which I was unaware of.

9 Q. So from the time that you set up your GoDaddy e-mail
10 account, all sent e-mails from all e-mail accounts on your
11 company GoDaddy account were auto-deleted after six months; is
12 that right?

13 A. Provided there was no reply, yes.

14 Q. Well, let's not talk about the replies.

15 I just want to confirm everything was deleted
16 automatically from the sent folder of every one of your
17 company e-mail accounts from the time you set it up until
18 sometime in 2015, when you changed for two of those e-mail
19 boxes, right?

20 A. Well, no, because it was six months' trailing. So I
21 discovered it in 2015. They were able to recover two weeks of
22 data. So it's six months and two weeks back is what I was
23 able to get recovered.

24 Q. Got it.

25 So what's the date where the auto-purging ended just

1 for your two e-mail accounts, if you know?

2 A. Late 2014.

3 Q. Late 2014, as in December 2014?

4 A. I would have to look at the exact date.

5 Q. Well, if you discovered it in June of 2015, and we go back
6 six months, would that be December of --

7 A. I want to say it was like November, but I'm not a hundred
8 percent sure.

9 Q. Okay. And who knows that answer?

10 A. My sent box by looking at it.

11 Q. You would just do it yourself and go look at it?

12 A. Yes, that's the way to find it.

13 Q. And you can tell because the e-mails, they're gone, right?

14 A. Exactly.

15 Q. And that is for your bduke and your support e-mail
16 accounts, right?

17 A. Yes.

18 Q. Okay. Now, your prior lawyers just produced an e-mail
19 that you had with lawyer Travis Life.

20 MR. DAVIS: Can we see your exhibit -- I think,
21 maybe -- it is, maybe, your exhibit, Exhibit 23, BD 23.

22 BY MR. DAVIS:

23 Q. So this is your -- I'm sorry -- not your prior lawyers,
24 but you have produced it.

25 THE COURT: What's the exhibit number?

1 MR. DAVIS: 23. Defendants' 23.

2 MR. SMITH: It is a Defendants' exhibit.

3 MR. SALAM: Defendants' Exhibit 23.

4 MR. DAVIS: Yep.

5 BY MR. DAVIS:

6 Q. I ask you to take a look at the screen and look at the
7 first page of this e-mail.

8 A. Okay.

9 Q. And what is this?

10 A. Piecing this together, I know that my lawyers were asking
11 me for documents. They were doing Bill Edmiston's deposition,
12 it looks like, that day.

13 MR. SALAM: Your Honor, may I object and ask
14 that -- I would prefer that he not discuss attorney-client
15 privileged communications and if we could ask him what this is
16 or what this exhibit shows.

17 THE COURT: Well, the question is: "What is this?"

18 MR. DAVIS: It is their exhibit.

19 THE COURT: Yes.

20 MR. SALAM: I was just trying to -- continue.

21 THE COURT: Go ahead.

22 THE WITNESS: Okay. I mean, it looks to be the day
23 that I discovered the GoDaddy e-mail issue. So piecing this
24 together, by looking at what happened that day, it looks like
25 they were doing Bill Edmiston's deposition, and he had a

1 misstatement, and they wanted me to find a file in my e-mails.

2 BY MR. DAVIS:

3 Q. And how do you know all that from this e-mail?

4 A. Because it says: "We have completed Bill Edmiston's
5 deposition. I have a couple of questions for you."

6 And I said: "I just tried to call you."

7 And the thing before you showed me was a GoDaddy
8 thing saying "Thank you for calling," or whatever it said,
9 that showed that I called GoDaddy that day.

10 MR. DAVIS: All right. Can we go to the first page
11 of, I think, this exhibit?

12 BY MR. DAVIS:

13 Q. And what is this?

14 A. So this was when I called GoDaddy, when I discovered what
15 was going on. This is the day I discovered the issue. So I
16 called GoDaddy to see why my e-mails were all missing.

17 Q. And where on this document does it say what you called
18 GoDaddy about?

19 A. Well, it doesn't say it. It shows that I called them that
20 day.

21 Q. And how many more of these types of documents do you have
22 in your e-mail collection, in your account?

23 A. I do not know.

24 Q. How many times have you called GoDaddy?

25 A. Many times.

1 Q. Many times?

2 A. Yes.

3 Q. Okay. And every time you call, you get an e-mail saying:

4 "Thanks for calling. Fill out the survey"?

5 A. That I don't know.

6 Q. That's pretty common, though, right? You get these every
7 time. You get a survey request of "How did we do?" Is that
8 what this is?

9 A. I haven't tracked, but, yes, that's what this is: "You
10 just called. Do a survey."

11 Q. Okay. And what did Mr. Life want to talk to you about?

12 A. Bill Edmiston had a misstatement in his deposition about
13 ownership of the company.

14 Q. All right. And what specifically was the misstatement?

15 A. He didn't own any of the company, and he thought he did.

16 MR. SALAM: Your Honor, I'm going to object on
17 relevance grounds.

18 THE COURT: I will overrule. Let's see how far it
19 goes. I think I know where it is going, but I'm not that
20 smart. So we will see if I need to reign it in.

21 BY MR. DAVIS:

22 Q. So was it that after the deposition, your attorney was
23 calling you to get copies of some agreements that Mr. Edmiston
24 talked about at his deposition?

25 A. Exactly.

1 Q. Okay. And what did you tell your attorney that day about
2 this issue you learned about GoDaddy?

3 A. I mean, I told him what happened, that the e-mails had
4 auto-purged, and that I fixed it, but all of the e-mails
5 between -- from up until 2014, to the best of my knowledge, in
6 my sent folder were gone.

7 Q. And was that before you -- you told Mr. Life, your
8 attorney, before you called GoDaddy or after?

9 A. I don't recall.

10 Q. Okay. And what specifically did you learn from GoDaddy
11 when you called that day?

12 A. That that's an automatic account setting, and that's the
13 way the e-mail comes, and if you don't change it, that's what
14 it does, and they then directed me how to fix it. So I was
15 able to fix it while I was on the phone with them to stop
16 doing it in the future, and then they said they could recover
17 whatever it was, ten days or two weeks of data.

18 Q. And did you report all of that to Mr. Life?

19 A. If I spoke to him after the call, I did report it to him.
20 If I spoke to him before the call, I would have just said:
21 "All the e-mails are missing. I don't know what's going on."

22 Q. Okay. And you don't have a recollection one way or the
23 other?

24 A. I am pretty certain I called him afterwards, but I'm not a
25 hundred percent sure.

1 Q. And did Mr. Life give you any directions about what to do
2 in connection with that?

3 A. I don't recall.

4 Q. Okay. Did he send you any e-mails in regard to -- that
5 day in regard to this auto-purge problem?

6 A. I don't believe so. I'm not sure, though.

7 Q. Do you recall if he ever sent you any e-mails at all about
8 the auto-purge problem?

9 A. I'm sure at some point I received e-mails about it. I
10 don't know when.

11 Q. Right.

12 And other than telling him orally -- or the only way
13 you told him was telling him over the phone about it?

14 A. Yes.

15 Q. There was no e-mail from you to him about an auto-purge
16 problem?

17 A. I don't believe so.

18 Q. Now, I'm going to direct your attention to your
19 Defendants' Exhibit No. 5. I will have that brought in front
20 of you.

21 This is identified in your exhibit list as a
22 Declaration of Travis Life, dated May 14, 2018, Docket 253-2.

23 Do you see that in front of you?

24 A. Yes, I do.

25 Q. Do you recognize it?

1 A. Yes, I have seen it in preparation.

2 Q. All right. And this was filed with the court; do you
3 understand that?

4 A. Yes.

5 Q. And it was -- it's dated May 14th, 2018.

6 Do you understand that?

7 A. Yes.

8 Q. Okay. And this is a couple of years after the auto-purge
9 problem, right?

10 A. Yes, definitely.

11 Q. Yes.

12 Like three years later?

13 A. Exactly.

14 Q. And taking a look at the first page and the second page of
15 the declaration -- let me know when you are ready for the
16 second page.

17 A. I'm ready for the second page.

18 Q. Review this declaration.

19 A. Okay.

20 Q. And the next page.

21 A. Okay.

22 Q. And this last page, No. 4.

23 A. Okay.

24 Q. Anywhere in that exhibit on May 14th, 2018, describe this
25 auto-purge problem?

1 A. No.

2 Q. Did you review this declaration from your attorney
3 Mr. Life before it was filed?

4 A. I don't believe so.

5 Q. No?

6 A. No.

7 Q. During the course of this case, was it your practice with
8 your attorneys to review things they were filing on your
9 behalf and your company's behalf in the case?

10 A. It's my understanding this is on his behalf; is it not?

11 Q. He is your attorney at the time he wrote this, right?

12 A. Yes.

13 Q. And he's representing you in the case?

14 A. Yes.

15 Q. And your company?

16 A. Yes.

17 Q. So he is filing this on your behalf, right, and your
18 company's behalf?

19 A. I suppose so.

20 Q. Okay. And nowhere in this document does he disclose the
21 auto-purge problem that you told him about in 2015, right?

22 MR. SALAM: Objection, your Honor, asked and
23 answered.

24 THE COURT: Overruled.

25 Just answer it.

1 THE WITNESS: Okay. It's not in here.

2 THE COURT: There we go.

3 BY MR. DAVIS:

4 Q. Okay. Did you ever use any chat or instant messaging
5 applications with any of the attorneys in this case?

6 A. No.

7 Q. And the setting change on the two e-mail accounts, you did
8 that yourself, right?

9 A. This is actually not accurate.

10 THE COURT: When you say "this," what are you
11 referring to, Mr. Duke?

12 THE WITNESS: The setting change on No. 15.

13 THE COURT: Oh, Paragraph 15 in Exhibit No. 5 --

14 THE WITNESS: Yes.

15 THE COURT: -- that you have in front of you?

16 Okay.

17 BY MR. DAVIS:

18 Q. All right. Why is Paragraph 15 of this exhibit -- this is
19 your Exhibit No. 5. It is your attorney's declaration. What
20 is wrong with Paragraph 15?

21 A. support@21centurysmoking was never forwarded.

22 Q. Explain that.

23 A. bduke@21centurysmoking.com was forwarded to my Yahoo!
24 e-mail. support@21centurysmoking.com was never forwarded.

25 Q. Never forwarded.

1 So all the times that your attorneys put that in
2 papers and filed it with the court and told us and the court
3 about it, that was inaccurate; is that what you are saying?

4 A. Yes, if it was -- if it was told a bunch of times, yes, it
5 is inaccurate.

6 Q. All right. And it never happened that any documents or
7 e-mails were forwarded, to make sure I understand it, from
8 support?

9 A. Correct.

10 Q. That's your support@21centurysmoking.com e-mail account,
11 they were never automatically forwarded to your personal
12 Yahoo! e-mail account; is that right?

13 A. Yes, that's correct.

14 Q. All right. And why would anyone tell us about that? Why
15 is auto-forwarding important?

16 MR. SALAM: Object, your Honor.

17 THE COURT: Yes, I will sustain.

18 BY MR. DAVIS:

19 Q. Do you understand what auto-forwarding it?

20 A. Yes.

21 Q. Why is the attorney apprising the court of this issue in
22 this declaration, if you know?

23 MR. SALAM: Objection, your Honor.

24 THE COURT: Let him finish the question.

25 And the basis for the objection?

1 Again, I got real simple rules: Stand up, object,
2 tell me a rule or basis.

3 MR. SALAM: He is asking why the attorney did
4 something.

5 THE COURT: Okay. If you know. Do you know?

6 THE WITNESS: I have no idea.

7 THE COURT: Okay.

8 BY MR. DAVIS:

9 Q. All right. I'm going to -- again, this is --

10 MR. DAVIS: We will move this -- ask that this be
11 moved into evidence. It is a pleading or document filed in
12 this case. Similarly, we would ask for anything that's on the
13 record to be part of the evidentiary hearing.

14 THE COURT: I assume there is no objection?

15 MR. SALAM: I have no objection, your Honor.

16 THE COURT: Okay. Defendants' Exhibit No. 5, which
17 is Mr. Life's declaration, will be admitted.

18 (Defendants' Exhibit 5 was offered and received in
19 evidence.)

20 BY MR. DAVIS:

21 Q. And just so I'm clear, is there anything else in this
22 May 14, 2018, declaration that you just read, that was drafted
23 by your attorney, filed with the court, anything else in there
24 that's wrong or false?

25 THE COURT: And if you need time to review it --

1 THE WITNESS: Yes, that stands out to me. I would
2 have to reread the whole thing again slowly to make sure, but
3 that is clearly wrong.

4 MR. DAVIS: Please do.

5 THE WITNESS: Okay. Next page?

6 Next page?

7 Next page?

8 No, it looks fine.

9 MR. DAVIS: Thank you.

10 BY MR. DAVIS:

11 Q. Did you ever tell your attorney Mr. Life not to disclose
12 the auto-delete problem to anyone?

13 A. No.

14 Q. Did you ever tell him not to disclose it to the court or
15 Plaintiffs in this case?

16 A. No.

17 Q. All right. Did your attorney Mr. Life tell you any
18 obligations you had to disclose that problem?

19 A. I disclosed it to my attorneys.

20 Q. And did he tell you anything about your further obligation
21 to disclose that information to anyone?

22 A. No.

23 Q. A few days later, June 29th of 2015, your testimony is you
24 disclosed this auto-purge problem to Mr. Life, right?

25 A. Yes, if that's the date, yes.

1 Q. That's the date on your e-mail with him.

2 A. Okay.

3 Q. And a few days later, your attorneys disclosed additional
4 documents between Mr. Edmiston and your company, right, the
5 agreements with Mr. Edmiston?

6 Do you remember that?

7 A. I do not. I believe you, but I do not remember.

8 Q. Well, your attorneys -- well, do you remember looking, at
9 the time, for documents related to your agreement with
10 Mr. Edmiston?

11 A. Looking at the these e-mails, refreshing my memory, yes,
12 because he had misspoke in his deposition.

13 Q. You did.

14 But you found some documents or he had them after the
15 dep that showed he had some kind of an agreement with your
16 company, right?

17 A. Yes, yes.

18 Q. And your attorneys produced those documents?

19 A. I don't know what my attorneys produced. I will take your
20 word for it.

21 Q. I'm going to direct your attention to a section of -- your
22 attorneys just filed a brief on your behalf, right, you are
23 aware of that, last Thursday?

24 A. Yes.

25 Q. And that was responding to the pending motion for

1 sanctions against you, right?

2 A. Yes.

3 MR. DAVIS: All right. I'm going to ask that that be
4 displayed, that is -- what is the docket of that?

5 It is Docket 347, your Honor.

6 THE COURT: I have got it right in front of me.

7 MR. DAVIS: Defendants' brief. It is up on the
8 screen now.

9 BY MR. DAVIS:

10 Q. Are you familiar with that?

11 A. Yes.

12 Q. Did you assist your attorneys in preparing this filing?

13 A. Yes, I did.

14 MR. DAVIS: And I'm going to ask for Page 14 to be
15 displayed of the brief.

16 BY MR. DAVIS:

17 Q. You see there is a section here about "GoDaddy Accounts
18 Auto-Purge."

19 Do you see that?

20 A. Yes.

21 Q. Okay. And you see the second paragraph under that?

22 A. Yes.

23 Q. Could you read it out loud, please?

24 A. "On or about June 29, 2015, Mr. Duke discovered the
25 corporate e-mail accounts" --

1 THE COURT: Hold on. A little bit slower.

2 THE WITNESS: Sorry.

3 THE COURT: This is -- context is artificial. So go

4 a little slower.

5 THE WITNESS: I talk a little too fast.

6 THE COURT: Not a problem.

7 THE WITNESS: "On or about June 29, 2015, Mr. Duke

8 discovered that the corporate e-mail accounts" --

9 MR. DAVIS: I'm sorry. The second paragraph, not the
10 first one, the second one.

11 THE WITNESS: "On or about June 29, 2015, he called
12 GoDaddy to find out why he could no longer access those
13 e-mails. During that call with Go Daddy's representative, he
14 learned for the first time of Go Daddy's default auto-purge
15 setting. Mr. Duke immediately took steps to notify former
16 defense counsel of these facts."

17 BY MR. DAVIS:

18 Q. Does that accurately reflect what happened?

19 A. Yes, I believe so, yes.

20 Q. And was it the case that you realized you had this problem
21 in 2014, but you never looked into it until 2015?

22 MR. SALAM: Object, your Honor, that wasn't his
23 testimony.

24 THE COURT: Well, you can answer it.

25 THE WITNESS: I don't understand where you are

1 getting 2014 from.

2 BY MR. DAVIS:

3 Q. You had made a representation in a prior document that you
4 said in or about 2014 you learned of this problem.

5 Do you recall that?

6 A. I do recall seeing that, and that was, obviously, an
7 incorrect statement.

8 Q. Okay. And the thing that's -- what's changed your
9 testimony is the e-mail from GoDaddy and the e-mail from
10 Mr. Life?

11 A. I actually spoke with GoDaddy and discussed with them what
12 the contents of the call were, and they told me.

13 Q. Right.

14 Because if you look at the bottom of this page of
15 your brief, right, the last two lines, it says March 19, 2018,
16 you signed a declaration which states in part:

17 "In or about 2014, I first learned that the default
18 settings for the provider of 21CS's e-mail server,
19 godaddy.com, automatically deleted e-mails sent from its
20 @21centurysmoking.com e-mail addresses after a short period.
21 As soon as the provider settings were discovered, the settings
22 were adjusted to save all sent e-mail?"

23 That is what you said in your March 19th declaration,
24 right?

25 A. Correct.

1 Q. Okay. And if we can go back one page, Page 14, in the
2 first paragraph, under this heading, "GoDaddy Account
3 Auto-Purge," right, do you see in the middle where it says:
4 "Mr. Duke discovered this setting while searching for
5 certain e-mails at the direction of former defense counsel?"
6 Do you see that?

7 A. Yes.

8 Q. And the next line says what?

9 A. "During that process, he discovered he could no longer
10 access or find certain e-mails that he had previously located
11 and which had previously been -- which had been previously
12 provided to former defense counsel for production."

13 Q. So that means at that time you were looking, you couldn't
14 find e-mails that you previously found because they were gone,
15 right?

16 A. Exactly.

17 Q. And they were gone forever?

18 A. I don't know if they are gone forever, but they were gone.

19 Q. And you can't find them?

20 A. I couldn't find them in the sent folder.

21 Q. Right.

22 And did you continue searching to see if you could
23 find them anywhere else?

24 A. Well, yes, I believe I was looking for a document, so I
25 would have looked on my computer for the document as opposed

1 to in my e-mail.

2 Q. Got it.

3 But the e-mails itself were gone? You couldn't find
4 them?

5 A. Not necessarily. He probably replied to me.

6 Q. And you don't say that in this brief, though, right?

7 A. No.

8 Q. You say you could no longer access or find certain e-mails
9 that you previously located, right?

10 A. Because that is what happened at that moment, yes.

11 Q. At that moment in time?

12 A. Yes.

13 Q. Okay. And that's your testimony as to what that means in
14 this brief?

15 A. Yes.

16 Q. I'm going to direct your attention now to --

17 THE COURT: Can you hold on one second here?

18 MR. DAVIS: Thank you, your Honor.

19 THE COURT: You don't need to thank me. I need to
20 just double-check something here.

21 (Brief pause.)

22 THE COURT: Go ahead.

23 BY MR. DAVIS:

24 Q. I'm going to turn your attention now to two exhibits that
25 your attorneys just produced over the weekend. These are your

1 exhibits, Exhibits 53 and 54, Defendants' Exhibits 53 and 54.

2 And do you know what those exhibits are?

3 A. Can you --

4 Q. Yes, sorry, I didn't see those up yet.

5 MR. DAVIS: No. 53.

6 BY MR. DAVIS:

7 Q. All right. What is displayed in front of you is the way
8 it was produced to us. It doesn't have a Defendants' exhibit
9 marking, but this is the e-mail -- or I should say the
10 document we got by e-mail this weekend.

11 Do you recognize it?

12 THE COURT: And is this Exhibit 53 or 54 that's in
13 front of me right now?

14 MR. DAVIS: That's 53 that's on the screen, your
15 Honor.

16 THE COURT: Because, remember, I don't have either
17 one of these documents. So I just want to keep track.

18 MR. SALAM: Your Honor, during the break, I provided
19 a binder of exhibits in the folder on the inside.

20 THE COURT: A different folder?

21 MR. SALAM: It has 53, 54, and 57.

22 THE COURT: And even though it says Exhibits 1
23 through 52, they are in the --

24 Got it. Okay. Got it. Thank you.

25 THE WITNESS: Is this the whole document, just one

1 page?

2 MR. DAVIS: This is the second page, is this.

3 THE WITNESS: Okay.

4 BY MR. DAVIS:

5 Q. Do you recognize it?

6 A. Yes.

7 Q. You authorized your attorneys to produce it and disclose
8 it in this proceeding?

9 A. Yes.

10 Q. And what is it?

11 A. It was just an effort we were making to send the
12 recordings that Bill Edmiston had sent over, and that is when
13 he sent that over to me, and I sent it over to my lawyer.

14 Q. So you received it from who?

15 A. Bill Edmiston.

16 Q. And you sent it to one of your prior attorneys,

17 Ms. Liberman?

18 A. Yes.

19 Q. And what's attached to that e-mail is what?

20 A. A video or audio of a recording from a trade show in
21 Las Vegas.

22 Q. And that's what you can see there, that IMG_0117.MOV file?

23 A. Yes.

24 Q. Right.

25 And this was sent from you, from your Yahoo! e-mail

1 account, to your attorney Ms. Liberman, right, in October of
2 2014?

3 A. Yes.

4 Q. Okay. And you received -- you received it that date from
5 Mr. Edmiston, right?

6 A. Correct.

7 Q. And was it your decision alone not to forward to your
8 attorneys the other recordings that you received from
9 Mr. Edmiston?

10 MR. SALAM: Objection, foundation.

11 THE COURT: Back it up a little bit. Ask him if he
12 received the other recordings.

13 BY MR. DAVIS:

14 Q. Did you receive any other recordings from Mr. Edmiston
15 that he took at that trade show you just referenced?

16 A. I'm not sure which one this is, but, yes, I received two.

17 Q. All right. And was it your decision alone not to
18 forward it to --

19 THE COURT: When did you receive those?

20 THE WITNESS: I believe like right away, he sent two.

21 THE COURT: Right away.

22 Give me a month and a year.

23 THE WITNESS: Probably around this time. I'm not
24 sure exactly when this happened.

25 THE COURT: October of 2014?

1 THE WITNESS: Whenever this happened, I'm not exactly
2 sure what date this was.

3 THE COURT: I don't know when it happened, so I can't
4 help you.

5 MR. SALAM: I believe there is an e-mail.

6 THE COURT: Okay.

7 MR. SALAM: We can make life easy if we just go into
8 the exhibit with the e-mail with the second video.

9 THE COURT: All right. I interrupted. I
10 interrupted.

11 Go ahead, Mr. Davis.

12 MR. DAVIS: Thank you.

13 BY MR. DAVIS:

14 Q. So you had two recordings e-mailed to you from
15 Mr. Edmiston, right?

16 A. Yes.

17 Q. And you provided this one, 0117, to your attorneys, right?

18 A. Yes.

19 Q. And did you provide the second one to your attorneys?

20 A. I do not think so. I'm not sure.

21 Q. All right. And my question is: Was it your decision
22 alone not to forward to your attorneys the second recording?

23 A. Yes.

24 Q. Why?

25 A. Because the recording literally said on it, basically,

1 something -- or not literally, something to the effect of
2 "There is no recording. I didn't get it. Will try to send
3 later" or something to that effect.

4 And although there was an attachment, every e-mail of
5 his seems to have an attachment because his business card is
6 an attachment. So every Bill Edmiston e-mail has an
7 attachment. So if his e-mail said there is nothing here, I'm
8 not going to forward it. So I never even looked at the
9 attachment. I did not realize there was a second recording
10 until very recently.

11 Q. And when was that, how recently?

12 A. Whenever this came up through my lawyers.

13 Q. And did you listen to the second recording?

14 A. I am not even sure which one I sent and which one I didn't
15 send. So I never -- I don't think I ever even listened to
16 them when I sent them. I just sent them.

17 THE COURT: But the question is have you ever
18 listened to them.

19 THE WITNESS: I know I have listened to at least one
20 of them. I don't know that I have listened to both of them.
21 I didn't even realize there was a second one.

22 THE COURT: Do you know if you listened to the first
23 one or the second one?

24 THE WITNESS: That I don't know.

25 THE COURT: Okay.

1 BY MR. DAVIS:

2 Q. So you have more e-mails in your possession between you
3 and Mr. Edmiston, is that right, that you haven't produced?

4 A. I would believe so, yes.

5 Q. Okay. And you are saying in this e-mail -- this is your
6 new Exhibit 53. You are saying there -- it is from you, and
7 what do you write to your attorney Ms. Liberman?

8 A. "I think you already have this, but he just sent this to
9 me."

10 Q. All right. So you previously already sent a recording to
11 your attorneys, right?

12 A. Yes, so I was hopeful this was the second recording.

13 Q. Okay.

14 A. But it wasn't.

15 Q. And --

16 THE COURT: Why did you think it was the second
17 recording?

18 THE WITNESS: Well, because he had sent one before,
19 and he said, "I'm going to send you the other one later," and
20 then later, he sends another one. So I'm like, "Maybe this is
21 it," and I sent it on.

22 THE COURT: But I thought you just said that you
23 didn't know there was anything on that second e-mail because
24 he always has an attachment?

25 THE WITNESS: No, no, there is a first e-mail and

1 there is a second e-mail. The second e-mail actually did have
2 the recording. I didn't realize it. I don't even think he
3 realized it. So there is a first e-mail with a recording.
4 There is a second e-mail with a recording. He still doesn't
5 realize that he has ever sent that second e-mail. So a few
6 days later, he sends me the first one again, if that makes
7 sense. So he sent, again, trying to help send the second
8 e-mail. He believed that only one e-mail had gone through. I
9 believed only one e-mail had gone through. So he was, a few
10 days later, following up with a second e-mail -- or I guess it
11 would be a third e-mail, following up with a third e-mail, to
12 try to send this second recording.

13 There is one e-mail with one recording, a second
14 e-mail with a second recording. He doesn't realize he sent
15 two. I don't realize he sent two. Days later, he sends a
16 recording, thinking that he is sending the second recording,
17 if that makes sense, but it just ends up being the same
18 recording that I had already seen that he sent.

19 THE COURT: Okay. Go ahead.

20 BY MR. DAVIS:

21 Q. This is in 2014, right?

22 A. Yes.

23 Q. And at this time, whenever your attorneys need you to
24 search for e-mails, they contact you and have you search your
25 records, right?

1 A. Yes.

2 Q. Because they don't have any access in 2014 to your Yahoo!
3 e-mails or your GoDaddy e-mails, right? You have them?

4 A. Correct.

5 Q. Okay. And --

6 THE COURT: And that's because they weren't imaged.

7 Only the hard drives were imaged, right?

8 MR. DAVIS: That's right.

9 BY MR. DAVIS:

10 Q. And they are not preserved anywhere, and no ESI vendor has
11 made a copy of them, right, in October of 2014, right?

12 A. I don't remember when ESI even happened. I don't remember
13 when the vendor -- when that happened. I don't know if this
14 is before that or after that, but yes.

15 Q. All right. Well, we had our conference in the middle of
16 2014, and your ESI vendor, I think, did it in December of
17 2014, right?

18 A. So this would have been before that anyway.

19 Q. Right. But I just wanted to confirm your process.

20 And at this time, you are communicating and e-mailing
21 with Mr. Edmiston on the same day, right?

22 A. Yes.

23 Q. All right. I'm going to have you look at --

24 MR. DAVIS: Move this into evidence, Defendants'
25 Exhibit 53.

1 THE COURT: Any objection?

2 MR. SALAM: No objection, your Honor.

3 THE COURT: All right. 53 will be admitted.

4 (Defendants' Exhibit 53 was offered and received in
5 evidence.)

6 BY MR. DAVIS:

7 Q. I would like you to look at Plaintiff's Exhibit 24.

8 THE COURT: Plaintiff's 24.

9 BY MR. DAVIS:

10 Q. Could you take a look at that and tell me if you recognize
11 it?

12 A. Yes.

13 Q. And that's an e-mail from who to who?

14 A. Bill to me.

15 Q. And is it your testimony today that you never forwarded
16 the e-mail you received on October 4th, 2014, marked as
17 Plaintiff's Exhibit 24, in front of you, to your attorneys?

18 A. I said I forwarded one, not the second one.

19 Q. Right.

20 So this one you didn't send to your attorneys or you
21 did?

22 A. I believe I sent it from my bduke account.

23 THE COURT: To?

24 THE WITNESS: The bduke@21centurysmoking account. I
25 don't think I sent it from this account.

1 THE COURT: All right. And you sent it to who -- or
2 to whom? Sorry.

3 THE WITNESS: I don't recall. My previous counsel.
4 I don't know which one.

5 THE COURT: Okay. But you do recall sending it to
6 your previous counsel?

7 THE WITNESS: Sending at least one, yes.

8 THE COURT: At least one what?

9 THE WITNESS: Recording. I sent one recording, not
10 two recordings.

11 THE COURT: This e-mail, the one that's in front of
12 you, Exhibit 24, do you recall if you sent that e-mail?

13 THE WITNESS: This e-mail, no.

14 THE COURT: You don't remember sending it?

15 THE WITNESS: This e-mail I would not have sent.

16 THE COURT: Go ahead, Mr. Davis.

17 BY MR. DAVIS:

18 Q. If you could read out loud the first paragraph from
19 Mr. Edmiston to you on October 4, 2014.

20 A. "I found a longer one that I cannot forward. Too long,
21 but I have it. So there is a second one. Mostly, just
22 general talking, but he does state they have gone to the FDA
23 and they have Washington lobbyists. Also states this guy is
24 the one that goes to the factory and tests the vaporizing for
25 the units.

1 "Long recording, and we did not get much good info in
2 this one that much clearer. We are bad spies :::) But this
3 proves they were there and maybe his voice can be identified."

4 Q. All right. Is it your testimony that you never informed
5 your attorneys about this e-mail marked as Exhibit 24?

6 A. I informed my attorneys that he was there and that he
7 spoke with them. I didn't necessarily inform them of this
8 specific e-mail.

9 Q. Did you inform them that Mr. Edmiston had another
10 recording that was too long to forward?

11 A. This is exactly what we were just talking about.

12 Q. This particular recording is what you are talking about.
13 This is the one he says he can't forward because it is too
14 long, right?

15 A. There is another e-mail where he says the same thing, but,
16 yes, there is two recordings. He thought he only sent one.
17 He thought the other one was too long to send.

18 Q. All right. So I'm clear, you never told your attorneys
19 about this information about a file that was too long to be
20 able to be forwarded, right?

21 A. Yes, I did tell them.

22 Q. When did you tell them?

23 A. That same time.

24 Q. And did you say it orally or in writing?

25 A. I believe orally.

1 Q. Orally. Okay.

2 And did you alone decide not to forward this e-mail
3 to your attorneys?

4 A. Yes, I alone decided not to forward this e-mail.

5 Q. Okay. And why did you decide to withhold the information
6 about another recording that was made at this event?

7 MR. SALAM: Objection, your Honor, that's not his
8 testimony. He said --

9 THE COURT: Yes, I will sustain.

10 Rephrase that.

11 BY MR. DAVIS:

12 Q. Why did you decide to withhold that information and not
13 give it to your attorneys or disclose it in this case?

14 MR. SALAM: Objection, your Honor.

15 THE COURT: Yes, sustained.

16 BY MR. DAVIS:

17 Q. Why did you decide not to disclose the information in this
18 e-mail to anyone?

19 MR. SALAM: Objection, your Honor.

20 THE COURT: I will sustain.

21 If you ask him "Why did you decide not to forward
22 this e-mail?" --

23 MR. SALAM: I won't object.

24 THE COURT: -- that's a perfectly good question.

25

1 BY MR. DAVIS:

2 Q. Why did you decide not to forward this e-mail to anyone?

3 A. I told my lawyers the content of the e-mail on this
4 occasion.

5 Q. And what did you tell them?

6 A. That "I'm sending one recording. There is a second
7 recording that's too long. We have to figure out a way for
8 him to get it to you."

9 MR. DAVIS: All right. We move Plaintiff's
10 Exhibit 24 into evidence.

11 MR. SALAM: No objection, your Honor.

12 THE COURT: Okay. Plaintiff's Exhibit 24 will be
13 admitted.

14 (Plaintiff's Exhibit 24 was offered and received in
15 evidence.)

16 BY MR. DAVIS:

17 Q. I'm going to turn your attention now to Defendants'
18 exhibit -- your exhibit -- 54, which we received this weekend.
19 I ask you to take a look at that document. Again, it is not
20 marked. This is the way we received it. It doesn't have the
21 Bates stamp number.

22 Can you tell me if you recognize it?

23 A. Yes.

24 Q. And what is it?

25 THE COURT: 54. Okay.

1 THE WITNESS: It appears to be Travis, when he is
2 asking me to look for the e-mails for those specific topics.

3 BY MR. DAVIS:

4 Q. And can I just -- can you look at the first page of this?

5 All right. This is an e-mail between you -- and when
6 you say "Travis," that's one of your attorneys, right?

7 A. Yes.

8 Q. And Mr. Shonder, one of your other attorneys, is copied on
9 this?

10 A. Yes.

11 Q. All right. And you authorized the disclosure of this
12 document?

13 A. Yes.

14 Q. And if we go down to the first e-mail in the string again,
15 go to the last page, right?

16 A. Okay.

17 Q. So there is the footer --

18 THE COURT: Let me get this. One second.

19 Sorry, sorry.

20 MR. DAVIS: That's okay. It is Page 3 of 5.

21 THE COURT: Okay. I'm with you. Go ahead.

22 BY MR. DAVIS:

23 Q. All right. There.

24 So the original message was sent on Saturday,
25 March 17th, 2018; is that right?

1 A. Page 3 of 5?

2 THE COURT: 3 of 5, at the bottom.

3 THE WITNESS: There is nothing on Page 4? I just
4 want to confirm.

5 BY MR. DAVIS:

6 Q. There is a Page 4 of 5.

7 A. 4 of 5, yes. So this would be the beginning.

8 Q. So there is the very bottom.

9 So this is 3 of 5, again.

10 A. Okay.

11 Q. It is the beginning of the e-mail string.

12 Do you see that?

13 A. Yes.

14 Q. Where it says "original message"?

15 A. Yes.

16 Q. And this is an e-mail from Mr. Life to you?

17 A. Yes.

18 Q. And he sends it to your Yahoo! account, right?

19 A. Yes.

20 Q. And to your GoDaddy account?

21 A. Yes.

22 Q. And was this pretty much the standard way your attorneys
23 sent e-mails to you, to both your GoDaddy and Yahoo! account
24 throughout your case?

25 A. Not necessarily.

1 Q. No?

2 A. No.

3 Q. What account did they primarily send you e-mails on?

4 A. Any of my three accounts that I use.

5 Q. Okay. Was it typical that they sent e-mails to both
6 accounts, in most e-mails, to make sure you got it?

7 A. I wouldn't say necessarily, no.

8 Q. Okay. And what does your attorney ask you here?

9 This is, again, March 17, 2018, right?

10 A. Yes.

11 Q. And this confirms he is asking you a couple of questions.

12 Let's look at the last page. Do you see that
13 paragraph?

14 A. Yes.

15 Q. And why don't you read that?

16 A. "Did you ever find e-mails from the confused customer
17 Wood? We never produced any e-mails from her, so I assumed
18 that her e-mails were not retained, but I need to get that
19 confirmed from you.

20 "Also, we have invoices from Kirti/Webrecsol;
21 however, we have no e-mails. Do you have any Kirti or
22 Webrecsol e-mails?

23 "Finally, I'll send you the signature page in a
24 little bit for you to sign. Thanks!"

25 Q. All right. So your attorney is writing to you asking you

1 to find e-mails, right?

2 A. Correct.

3 Q. And that's because your attorneys don't have access to any
4 of the e-mails, right?

5 A. Correct.

6 Q. Right.

7 And they are not with some ESI vendor because their
8 first course of action is to call you when they need you to
9 find e-mails, right?

10 A. Yes.

11 Q. Okay. And describe the efforts or explain your prior
12 efforts to find those customer Wood's e-mails he describes.

13 A. I don't recall. Over the last seven, eight years, however
14 long this has been, I have searched for every e-mail they have
15 ever asked me for. I don't recall if I have ever been asked
16 to search for this, so I don't know.

17 Q. As you sit here today, you don't have any recollection
18 about searching for and finding the e-mails you sent back and
19 forth with your customer Ms. Wood?

20 A. I do not recall.

21 Q. All right. Let's go to your response to Mr. Life.

22 All right. Do you see at the bottom of 2, you are
23 writing back to him, right, on Saturday?

24 A. Yes.

25 Q. That's from your GoDaddy account, right?

1 And you say on Page 3 -- what does it say?

2 A. "So I searched for Kirti e-mails, and I mean there are
3 hundreds of them. Not sure if you just want my password or
4 what? But I don't really know what you want me to do with
5 this information."

6 Q. All right. And in there you don't say anything about the
7 Wood's e-mails, right? You just reference the Kirti e-mails?

8 A. Yes.

9 Q. And did you have a phone call on March 17th with your
10 attorney Mr. Life or any other attorneys at that time?

11 A. I believe we talked on the phone around that time. I'm
12 not sure exactly when.

13 Q. Do you recall having a phone call outside of this e-mail
14 about these issues of looking for lost e-mails?

15 A. I believe so, yes.

16 Q. Okay. And what did you discuss?

17 A. That there were topics that had been brought up that they
18 wanted me to search for in my e-mails.

19 Q. And were those conversations with just Mr. Life or with
20 all of your attorneys?

21 A. I don't recall who all I talked to about it.

22 Q. Do you remember talking to Mr. Stamatidis about it?

23 A. I don't recall.

24 Q. What about Mr. Shonder?

25 A. I don't recall.

1 Q. Okay. But they are all calling you because you are the
2 one that had access to the e-mails to do the searching, right?

3 A. Yes.

4 Q. None of your attorneys did at this time?

5 A. I don't believe so.

6 Q. And your attorney Mr. Life is saying here --

7 THE COURT: Can we pause here for a second?

8 I thought a long time ago this morning, you mentioned
9 that you gave your credentials to the attorneys so that they
10 could search, or did you offer to give it to them?

11 THE WITNESS: Do you see how I did it here in this
12 e-mail: "Not sure if you want my password or not"? I was
13 constantly asking them "Do you want my password?"

14 THE COURT: So that's basically what you did
15 previously?

16 THE WITNESS: And I don't recall if they ever took it
17 and looked up something.

18 THE COURT: Okay. That clarifies it. Okay. All
19 right.

20 BY MR. DAVIS:

21 Q. And you see from the e-mail from Mr. Life, he is saying,
22 "We don't have" --

23 MR. DAVIS: Go back to Page 4 of 5, please.

24 BY MR. DAVIS:

25 Q. All right. So he says, right, "Did you ever find the

1 e-mails from Ms. Wood? We never produced any e-mails for
2 her."

3 You know at this time that those e-mails are lost,
4 right?

5 A. I have no idea.

6 Q. Okay. But if we search your e-mails, and they are gone,
7 they are gone forever, right?

8 A. I would say the search engines for these e-mails are not
9 necessarily the most robust of search engines. So it is
10 possible it is there, and I didn't search well enough for it,
11 but it could be there.

12 Q. So the tools --

13 THE COURT: Anybody planning on doing a robust search
14 in this case?

15 THE WITNESS: This is all being searched currently.

16 THE COURT: We are going to take a quick break so I
17 don't blow a gasket.

18 (Recess taken.)

19 THE CLERK: Recalling 12 CV 50324, DR Distributors,
20 LLC v. 21 Century Smoking, Inc.

21 THE COURT: All right. I'm just perusing the docket.

22 Quoting the Grateful Dead: "What a long, strange
23 trip it has been" doesn't do this thing justice.

24 Unless somebody has a different date, Docket
25 Entry 116, I believe. It is like 200 docket entries

1 ago -- more than 200 docket entries.

2 March 4th, 2015, were we even back up here then? I
3 don't remember.

4 March 4th, 2015, this is one of the -- this is, I
5 think, the last scheduling order because it says: "This is a
6 final extension."

7 "This is a final extension" in all caps.

8 MR. SALAM: I'm sorry, your Honor, Docket 116?

9 THE COURT: 116.

10 "26(e) supplements due 6/1/2015." It seems like an
11 important date to me. That's all I'm saying.

12 Go ahead, Mr. Davis.

13 MR. SALAM: Your Honor, may I just ask a timing
14 question?

15 Do you know how late we are going to go today?

16 THE COURT: At least 5:00.

17 MR. SALAM: Thank you, your Honor.

18 THE COURT: Go ahead. Any time you are ready.

19 MR. DAVIS: Thank you, your Honor.

20 We move Defendants' Exhibit 54 into evidence.

21 MR. SALAM: No objection, your Honor.

22 THE COURT: I'm sorry?

23 MR. SALAM: No objection, your Honor.

24 THE COURT: Okay. And it is Defendants' 54?

25 MR. DAVIS: Yes, your Honor.

1 THE COURT: Okay. Defendants' Exhibit 54 will be
2 admitted.

3 (Defendants' Exhibit 54 was offered and received in
4 evidence.)

5 BY MR. DAVIS:

6 Q. Mr. Duke, is it your testimony today that at the time you
7 forwarded the file we were talking about, the recording, 117,
8 is that the only recording that was in your possession at the
9 time?

10 A. No.

11 Q. What other one did you have?

12 A. I don't know what the name of the other one was, but there
13 was two recordings.

14 Q. And the second recording was never given to your
15 attorneys; is that right?

16 A. Correct.

17 Q. Okay. Directing your attention back to the exhibit on the
18 screen, Page 4 of 5, your attorney says, after the question
19 about Ms. Wood, "We never produced any e-mails from her, so I
20 assumed that her e-mails were not retained."

21 What does your attorney mean by the word "not
22 retained" -- or the phrase?

23 MR. SALAM: Objection, your Honor.

24 THE COURT: I will sustain.

25

1 BY MR. DAVIS:

2 Q. Have you ever heard your attorneys -- any of your prior
3 attorneys use the words "not retained" in connection with any
4 of the documents you were retrieving for them?

5 A. I don't recall.

6 Q. Okay. And as you sit here today, you don't have an
7 independent understanding of what your attorney was saying
8 when he said, "So I assume that her e-mails were not
9 retained"? It doesn't mean anything to you?

10 MR. SALAM: Objection, your Honor.

11 THE COURT: Overruled.

12 THE WITNESS: What's the date of this again?

13 MR. DAVIS: It is an e-mail from Mr. Life on
14 Saturday, March 17th, 2018.

15 THE WITNESS: So he could be referring to if it was
16 just a sent e-mail, with no reply, it could, theoretically, be
17 lost is what I'm guessing he would be referring to by "not
18 retained."

19 BY MR. DAVIS:

20 Q. Because of the auto-purge problem?

21 A. Exactly.

22 Q. Got it. Okay.

23 And he could only confirm that by talking to you,
24 right?

25 A. Yes.

1 Q. He also says in here about "We have invoices from
2 Kirti/Webrecsol; however, we have no e-mails," right?

3 A. Yes.

4 Q. And is that the first time your attorneys are asking you
5 to search for Kirti/Webrecsol e-mails?

6 A. I believe so.

7 Q. And did they tell you why that was important to search for
8 that in March of 2018?

9 A. Because it had come up in whatever had been produced, and
10 the other side was asking for these e-mails for some reason.

11 Q. And they have no e-mails between you and Kirti at that
12 time, right?

13 A. I don't know. I don't recall how many they have. I don't
14 believe they had any.

15 Q. All right. Well, let's look at your response, again.

16 MR. DAVIS: All right. One more page.

17 BY MR. DAVIS:

18 Q. At the top there, this is your e-mail, right?

19 A. Yes.

20 Q. You say you have hundreds of them, right?

21 A. Yes.

22 Q. And you personally ran that search for those e-mails?

23 A. Correct.

24 Q. In your own account?

25 A. Yes.

1 Q. And you searched the live, active, online Yahoo! account,
2 right?

3 A. Correct.

4 Q. And did you also search the GoDaddy, the live online
5 GoDaddy account?

6 A. Yes, I did.

7 Q. And how did you do that?

8 A. By going into the search bar and searching for the terms
9 they asked me to search for, as I would always do.

10 Q. Okay. And you can do that from any computer anywhere,
11 right?

12 A. Yes.

13 Q. Okay. And did you save the results of that search
14 anywhere?

15 A. Yes.

16 Q. Okay. And where did you save it?

17 A. My laptop.

18 Q. And how did you designate it as saved? What is it? How
19 did you do it?

20 How would you know what that saved information is
21 from that search?

22 A. I would either print to .pdf or I would save on the -- the
23 GoDaddy ones can be saved as .eml files. I don't know if I
24 saved those as .eml or if I printed a .pdf for all of them. I
25 don't recall.

1 Q. Okay. And in this instance, we are talking about here
2 Exhibit 54, did you send the hundreds of e-mails you found
3 from your search to your attorneys on that date?

4 A. I sent -- yes, I sent the e-mails. I don't know if it was
5 on that date, but I collected them all and sent them as fast
6 as I could.

7 Q. And you gave -- everything you found in your search, you
8 gave to your attorneys?

9 A. Correct.

10 Q. Okay. And let's look at Mr. Life's response to you. He
11 writes: "Brent, we need you to send those e-mails to us."
12 Right?

13 A. Correct.

14 Q. He says: "Please download those e-mails and send them
15 over as soon as you can."

16 Right?

17 A. Correct.

18 Q. So Mr. Life, why is he using the word "download"? Have
19 you done this with him before?

20 MR. SMITH: Objection, your Honor. Again, calls for
21 the state of mind of somebody else.

22 THE COURT: Do you know what he meant by "download"?

23 THE WITNESS: Download the e-mails, save them, and
24 send them.

25 THE COURT: Go ahead.

1 BY MR. DAVIS:

2 Q. All right. Do you know how many times prior to March 17,
3 2018, you have gone through this process with your attorneys
4 of searching your live online e-mails and downloading the
5 results?

6 A. A lot of times.

7 Q. How many?

8 A. A lot of times. I don't know the number, but a lot.

9 Q. And each time, did you save the results of that, as you
10 described previously?

11 A. Yes.

12 Q. And did each time you take the full result and send it to
13 your attorneys?

14 A. Of course.

15 Q. Okay. And in this case, do you remember approximately how
16 many -- you said it is hundreds of e-mails. So would it have
17 been hundreds of pages of a .pdf or something shorter than
18 that?

19 A. I don't recall exactly what I meant. I'm guessing I meant
20 hundreds of pages, hundreds of e-mails. I don't know. It was
21 a lot of documents. I don't know if I was exaggerating a
22 little bit, but it was a lot of documents.

23 Q. And do you still have the e-mail that you sent to your
24 attorneys that attached that .pdf or that download?

25 A. Yes.

1 MR. DAVIS: Okay. Is this 54 we are looking at? I'm
2 sorry. It is not marked.

3 THE COURT: It is 54.

4 MR. DAVIS: And I have that already in evidence.

5 Okay. Thank you.

6 BY MR. DAVIS:

7 Q. All right. So let's go back to when you were first hired
8 by -- or you first hired, I should say, Mr. Leavens.

9 You described, at the beginning of the litigation,
10 instructions that he gave you in that first meeting, is that
11 right, about preserving data?

12 A. Correct.

13 Q. All right. And I just want to confirm, but at no time did
14 Mr. Leavens ever give you written instructions about how to
15 preserve data in this case, right?

16 A. I can't say that with certainty. I don't recall getting
17 anything written.

18 Q. And if he did, we would search the e-mails to find it, if
19 it would have been an e-mail, most likely, if he sent you some
20 instruction like that?

21 A. It's not in my e-mail, but he could have handed me
22 something in one of these meetings, potentially.

23 Q. And are you guessing that's what happened, or do you have
24 a specific recollection that Mr. Leavens handed you a piece of
25 paper at the beginning of this case with directions about your

1 obligations to preserve data in this case?

2 A. I'm not guessing at anything. I'm just telling you I
3 don't recall. It's not in my e-mail. I have searched my
4 e-mail for it, so I do not believe it to be in my e-mail. I'm
5 not sure if it was given to me some other way.

6 Q. Right.

7 And you said it is possible he gave you a piece of
8 paper. I mean, a lot of things are possible. I'm trying to
9 find out what happened here.

10 So is it your recollection that he handed you written
11 instructions about preserving data in this case?

12 A. No, I do not recall --

13 Q. Okay.

14 A. -- receiving it.

15 Q. Okay. And same thing: Mr. Strand, did he give you any
16 written instructions?

17 A. I, again, have never spoken with Mr. Strand.

18 Q. You have never spoken to him, right, okay.

19 And we have reviewed the oral instructions he gave
20 you, and that's -- he gave that to you several times; is that
21 right?

22 A. I believe so, yes.

23 Q. Right.

24 And did you follow those instructions?

25 A. Yes.

1 Q. All right. And, again, we are speaking about the
2 beginning of this case in 2012; is that right?

3 You are clear on that?

4 A. Yes.

5 Q. Okay. And are you aware of or you have learned what
6 something called the "litigation hold" is through this
7 process?

8 A. No.

9 Q. You never heard that phrase before right now?

10 A. No.

11 Q. Okay. None of your attorneys have ever described to you
12 what a "litigation hold memo" is?

13 A. I don't know what it is, so I don't know if they described
14 it to me.

15 Q. And that's for all your prior attorneys and your current
16 attorneys, right?

17 MR. SALAM: Object, your Honor. Attorney-client
18 privileged communications with current attorneys aren't at
19 issue here.

20 MR. DAVIS: Well, I think there is case law that says
21 litigation hold is not a privileged communication.

22 THE COURT: Well, it's not relevant. So if you ask
23 the same question, but take it out as to current attorney --

24 MR. DAVIS: Sure.

25 THE COURT: -- that's fine.

1 BY MR. DAVIS:

2 Q. And to make sure I'm asking the question the right way,
3 when I say "litigation hold memo," this is something that the
4 Judge has discussed in open court. Your attorneys, I
5 represent to you, have admitted in open court they never
6 issued to you.

7 No one has ever described to you or discussed what a
8 litigation hold memo is ever, before today, outside of your
9 current counsel?

10 A. I don't know what it is, so I don't know if it has been
11 discussed with me, because I'm not even sure what you are
12 talking about.

13 Q. And so you have never been provided or no one has
14 described to you a written document that you should receive
15 from your attorneys describing your obligations in the case to
16 preserve and hold your electronic data and all your documents;
17 is that right?

18 A. As I said, it was oral. Through a meeting, he told me to
19 preserve the documents. I don't recall receiving anything in
20 writing, if that's what you are talking about.

21 Q. Got it.

22 No, I'm trying to understand whether you were told
23 anything in writing or orally, and you are confirming you
24 never received anything in writing?

25 A. I do not believe so, no.

1 Q. Right.

2 From any of your prior attorneys?

3 A. I do not believe so, no.

4 Q. All right. And I also want to be clear: This includes
5 your first attorney Mr. Rieger who you hired to draft the
6 complaint for you, the draft complaint -- draft a draft
7 complaint -- in 2011.

8 Did Mr. Rieger give you any instructions, written or
9 oral, about preserving data in connection with this case?

10 A. I don't recall, but I have never looked through e-mails
11 from him to see if he did, but I'm not sure.

12 Q. Okay. And same question for your friend/attorney Mr. Zeno
13 Baucus: In 2012, did he give you any instruction about
14 holding and preserving your data for this case?

15 A. I never hired him as an attorney, so I have never
16 discussed that with him.

17 Q. Right.

18 My question is did he discuss it with you?

19 A. No.

20 Q. You consulted with him, though, right?

21 A. He knew what was happening to me, and he was trying to
22 help me find a lawyer, but I never discussed things like that
23 with him.

24 Q. All right. At some point in time, the attorneys that were
25 representing you originally, it was Mr. Leavens, right?

1 A. Correct.

2 Q. And he was assisted by Heather Liberman, right?

3 Do you recall that?

4 A. Yes, correct.

5 Q. And you worked with both of them at the beginning of the
6 case?

7 A. Yes.

8 Q. E-mailed with them?

9 A. Yes.

10 Q. Spoke to them?

11 A. Yes.

12 Q. All right. Did there come a time when -- did there come a
13 time when Ms. Liberman left the firm and was replaced by
14 another attorney?

15 A. Yes.

16 Q. And who is that?

17 A. Travis Life.

18 Q. And when did that happen?

19 A. Somewhere in 2014, 2015, I believe.

20 Q. All right. And Mr. Life began representing you and your
21 company about that time?

22 A. Correct.

23 Q. And when he joined the firm and started representing you,
24 did Mr. Life give you any form of written instructions about
25 preserving data?

1 A. No.

2 Q. Okay. And so I'm clear, did any lawyer representing you
3 or your company ever give you specific instructions about your
4 obligations to preserve electronically stored information,
5 what we have been calling "ESI" today, at any time?

6 MR. SALAM: Object, your Honor. I just would like to
7 make sure it is limited to former defense counsel, not current
8 defense counsel.

9 MR. DAVIS: Excluding your current attorneys. Thank
10 you.

11 THE WITNESS: As I believe I have stated multiple
12 times, yes, they did tell me to preserve it. There is just
13 nothing written.

14 BY MR. DAVIS:

15 Q. Okay. And how did you come --

16 THE COURT: Can I pause you right there?

17 When I asked you the question about the Yahoo! Chat,
18 I think I asked you whether you understood that that was ESI
19 or electronically stored information. My recollection is your
20 specific answer was "I do now."

21 Did you know back at the time when you were being
22 told to preserve the information that you were to preserve the
23 Yahoo! Chat as well?

24 THE WITNESS: Yes, and I didn't delete the Yahoo!
25 Chat. The program just disappeared. So it is not like I went

1 out of my way and deleted the files. The literal program is
2 gone. So everything from the program is gone.

3 THE COURT: So fair to say it wasn't preserved?

4 THE WITNESS: Yes, fair to say.

5 THE COURT: Okay. All right.

6 Go ahead.

7 BY MR. DAVIS:

8 Q. And part of those conversations you had with Mr. Leavens
9 in the case, did he give you specific instructions, as the
10 Judge is asking you about, specific instructions about what
11 was to be included and the things to be preserved?

12 A. I don't recall.

13 Q. Did he say, "Don't throw out any of your computers"?

14 A. Of course.

15 Q. Did he say, "Copy all your online accounts and make sure
16 we have everything"?

17 A. It was "Don't delete anything off your computers" is what
18 I remember. "Don't delete any files. Your computers are
19 going to get searched. Don't delete anything." I remember
20 that being very specific, very important not to delete
21 anything.

22 Q. Got it.

23 And that's the sum and substance of your recollection
24 of the instructions from Mr. Leavens at the beginning of this
25 case and all those further times he told you about your

1 obligation to preserve?

2 MR. SMITH: Let me object to the form, your Honor.

3 This has been gone over about three times, and he has

4 previously described there was a lot more to the conversation.

5 He said it went on for 20 to 30 minutes at the beginning of

6 the case.

7 THE COURT: Okay.

8 MR. SMITH: We keep seeing this attempt to ask the

9 question over and over again and get a much narrower answer,

10 and it has been asked and answered.

11 MR. SALAM: Your Honor, I respectfully disagree with

12 Mr. Smith. I believe that the conversation that Mr. Davis has

13 been going at has been with respect to preservation and that

14 the witness testified they discussed other things besides

15 preservation or holding on, not destroying documents.

16 THE COURT: Hold on.

17 MR. SALAM: Specifically, I think something about a

18 \$10,000 check and other issues unrelated to --

19 THE COURT: The question was specifically to the

20 obligation to preserve.

21 So go ahead and ask that question regarding the

22 preservation, or I can read it back, whatever you want.

23 MR. DAVIS: That would be fine, your Honor.

24 THE COURT: Mr. Duke, the question is:

25 "And that's the sum and substance of your

1 recollection of the instructions from Mr. Leavens at the
2 beginning of the case and all those further times he told you
3 about your obligation to preserve?"

4 So you understand that there is -- clearly, the
5 lawyers and the court are making a distinction between copying
6 and preserving, deleting? Those are all different verbs,
7 right? So he is asking you about preservation of those.

8 THE WITNESS: Okay.

9 THE COURT: Okay. So with that instruction, why
10 don't you reframe the question in a way that hasn't been asked
11 already.

12 BY MR. DAVIS:

13 Q. Can you tell me everything Mr. Leavens told you in your
14 conversation with him the first time when he said, "Don't
15 delete anything"?

16 You know the conversation we are talking about?

17 A. Everything I said earlier is what I can recall at this
18 time. Nothing has changed.

19 Q. And is there anything else you want to add as part of your
20 testimony about what you spoke to Mr. Leavens about when he
21 told you "Don't delete anything"?

22 A. No.

23 Q. Okay. And one of the attorneys said you said you had a
24 20-, 30-minute conversation with him about "Don't delete
25 anything from your computers." Is that correct? Is that what

1 you had?

2 A. As my attorney just stated, we talked about retainers, we
3 talked about contracts, we talked about plans going forward.
4 I mean, we talked about a lot of things. We didn't just talk
5 about preserving data. It was very clear to me "Don't delete
6 anything, keep everything." There is not -- there was no
7 confusion there, "Preserve all documents."

8 Q. Got it.

9 I'm trying to understand if he gave you any other
10 instructions in that conversation, and I'm not limiting you in
11 any way. Say whatever you would like. Give me your full
12 testimony.

13 What did he tell you about preserving data and not
14 deleting things?

15 MR. SALAM: Object, your Honor.

16 THE COURT: Is there anything in addition?

17 THE WITNESS: Not that I recall at this point.

18 THE COURT: Okay. All right. That lilly has been
19 gilded.

20 BY MR. DAVIS:

21 Q. Now, at some point in time, other attorneys began
22 representing you in this case, in addition to Mr. Leavens,
23 Ms. Liberman, and Mr. Life; is that right?

24 A. Yes.

25 Q. All right. And, again, you learned -- you were referred

1 to Mr. Leavens from your -- from Mr. Rieger; is that right?

2 A. Yes.

3 Q. Okay. And at some point in time, an attorney, one of your
4 prior attorneys, named Peter Stamatis also began representing
5 you and your company in this case, right?

6 A. Correct.

7 Q. Do you remember when that was?

8 A. Prior to my deposition.

9 Q. Okay. And did your company sign a retainer agreement with
10 he and his firm?

11 A. I believe so, yes.

12 Q. Okay. And did he represent to you he had experience in
13 handling federal court litigation cases?

14 A. I don't recall what was told to me.

15 Q. Okay. Did Mr. Stamatis ever provide you anything in
16 writing about your obligation to preserve data in this case?

17 A. I don't recall.

18 Q. Do you recall if he ever issued you anything in writing
19 about your obligation to copy anything, any of your
20 electronically stored information, in this case?

21 A. I don't recall.

22 Q. Do you recall ever having an oral conversation with
23 Mr. Stamatis when he began representing you and your company
24 about preserving data?

25 A. I don't recall.

1 Q. Do you recall Mr. Stamatidis ever telling you anything about
2 not deleting data at any time?

3 A. I just don't remember. It's possible. I don't remember.

4 Q. Okay. And at some point in time, you hired another
5 attorney, right?

6 A. Which one?

7 THE COURT: An additional attorney.

8 BY MR. DAVIS:

9 Q. An additional attorney named Mr. Shoneder, right?

10 A. Yes, yes.

11 Q. Okay. Do you remember when that happened?

12 A. I do not know.

13 Q. Was he referred to your team by any particular attorney?

14 Why did he join your team?

15 A. I actually don't know why he joined the team. I'm not
16 sure how that happened. I believe he worked with Peter
17 Stamatidis on things.

18 Q. And did you sign a retainer agreement -- you and your
19 company sign a retainer agreement with Mr. Shoneder?

20 A. I imagine I did, yes.

21 Q. You say "I imagine I did."

22 A. I don't recall signing it, but I'm sure I did. He was
23 working for me.

24 Q. Okay. When Mr. Shoneder started representing you and your
25 firm, did he provide you with anything in writing about your

1 obligation to preserve data in any way in this case?

2 A. No.

3 Q. Did he give you anything in writing about copying data in
4 this case?

5 A. I don't believe so.

6 Q. Okay. Did he ever speak to you orally about your
7 obligations to preserve data in this case?

8 A. No. I only had met with him one time, and that one
9 meeting, we did not discuss that, no.

10 Q. Okay. And did you ever speak to Mr. Stamatis about
11 searching your data to find responsive e-mails?

12 A. Yes.

13 Q. And when was that?

14 A. Over the years, I have searched for a lot of responsive
15 e-mails. I can't tell you a specific time necessarily, but I
16 have done a lot of searching through e-mails over the last
17 seven years.

18 Q. And to be clear, I'm talking about attorney -- your prior
19 attorney Mr. Peter Stamatis.

20 A. Yes.

21 Q. Is it your testimony that you spoke to him and he would
22 have you go online and run searches on your online e-mail
23 accounts, Yahoo!?

24 A. If he was asking for something, I would search for it,
25 yes.

1 Q. And you have a specific recollection that he asked you to
2 do that?

3 A. I know I have done a lot of searches. I don't recall any
4 specific time that he specifically asked me. I believe I
5 likely did.

6 Q. Okay.

7 A. I was constantly searching for e-mails.

8 Q. And do you recall doing that specifically for your prior
9 attorney Mr. Tom Leavens?

10 A. Yeah, for sure.

11 Q. And do you recall doing that specifically for your
12 attorney Ms. Heather Liberman?

13 A. Definitely.

14 Q. And you recall doing that for your prior attorney
15 Mr. Travis Life?

16 A. Yes.

17 Q. Do you recall -- and you have already testified you did it
18 for Mr. Stamatis, right?

19 A. It would be hard for me to believe I did not. I don't
20 recall any specific time, but, yes, I believe I likely looked
21 up e-mails for Mr. Stamatis as well.

22 Q. And what about your prior attorney Mr. Shonder: Did he
23 ask you at any time to search your online e-mail accounts to
24 find responsive documents?

25 A. I'm not sure.

1 Q. And I just want to confirm that at no time did you
2 give -- you offered, but you never actually gave your online
3 e-mail account credentials to your attorneys; is that right?

4 A. I never gave it to them?

5 Q. That's my question, is you offered it to them, but you
6 never gave them your online e-mail account credentials; is
7 that right?

8 A. That's not right.

9 Q. Okay. When did you first give your online e-mail account
10 credentials to your attorneys?

11 A. I don't know the first time. There may have been multiple
12 times. I know for sure I did it in 2018.

13 Q. Okay. Prior to 2018, did you ever do it?

14 A. I just can't remember.

15 Q. And how would you have given it to them, if you did?

16 A. I would have either told them over the phone or e-mailed
17 them. Likely, over the phone, as not to be e-mailing my
18 passwords.

19 Q. Do you know how many times, approximately, you gave your
20 attorneys, prior to 2018, the credentials for your online
21 e-mail accounts?

22 A. As I said, I don't recall. It could be zero times. It
23 could be four times. I know I offered it. I don't recall if
24 they ever took me up on the offer.

25 Q. Do you know if your attorneys ever reported to you in any

1 way that after you offered your online e-mail account
2 credentials, that they reported to you that they accessed your
3 account and were able to search and pull off from your account
4 e-mails?

5 Did you ever hear of that?

6 A. I just don't have a recollection. I don't know.

7 Q. And you recall your deposition in June of 2015, right?

8 A. Yes.

9 Q. And I asked you at your deposition about whether or not
10 you ever delete e-mails.

11 Do you recall your answer?

12 A. I do not.

13 Q. Okay. I will tell you. You said no.

14 A. That would be consistent.

15 Q. Right?

16 A. Yeah, I don't delete e-mails.

17 Q. And is it still your testimony today that you never delete
18 any e-mails from any of your e-mail accounts?

19 A. I do not delete e-mails, no.

20 Q. You have never deleted an e-mail?

21 A. Junk mail.

22 Q. Okay.

23 A. I believe my Yahoo! account has hundreds of thousands of
24 e-mails. I really don't delete e-mail.

25 Q. Have you looked?

1 What's the size of your Yahoo! e-mail account today?

2 A. Very large.

3 Q. Very large?

4 A. Yes.

5 Q. Okay. And I also asked you at your deposition of June in
6 2015 if you had searched all your e-mail accounts to find
7 documents that were requested of you in this case.

8 Do you remember that?

9 A. Yes.

10 Q. And you remember your answer, right?

11 A. Yes.

12 Q. It was unqualified "Yes" just like you gave, right?

13 A. Yes.

14 Q. And I asked if you had turned all those records over to
15 your attorneys.

16 Do you remember that?

17 A. Yes.

18 Q. And you answered?

19 A. I'm sure I answered yes.

20 Q. Yes. Okay.

21 And do you still stand by that representation and
22 answer you made under oath on January 17th of 2015?

23 A. Yes.

24 Q. Okay. And so on June 1st of 2018, your attorneys produced
25 15,000 pages of e-mails that had never been produced, right?

1 A. Correct.

2 Q. Right?

3 A. Correct.

4 Q. So how could it be true that you searched and produced all
5 your e-mails when you said that at your deposition in 2015?

6 A. Well, I'm not an expert on discovery or any of this stuff.

7 I have not been through a lot of lawsuits. This is my first
8 lawsuit I have ever been involved in like this. I did
9 everything my lawyers asked. If they asked me to search for
10 e-mails, I gave them to them. I didn't have these search
11 terms. I didn't know what search terms we were supposed to be
12 looking for. They never told me those, the search terms. But
13 every single e-mail they asked me for, I sent the e-mail. So
14 if you are asking me did I give them the e-mails they were
15 requesting, absolutely, yes.

16 Q. And is it your testimony that prior to June 1 of 2018 that
17 you had never personally applied or used the search terms that
18 we agreed upon in this case and searched your online e-mail
19 accounts?

20 MR. SALAM: Object, your Honor, foundation.

21 THE COURT: I was going to ask the same question
22 myself, so I'm going to overrule it.

23 THE WITNESS: I never, ever was asked to go through
24 my e-mail and search all 20 of those terms, no.

25

1 BY MR. DAVIS:

2 Q. And you say "all 20 of those terms." You know exactly
3 what I'm talking about, right?

4 A. Well I have seen them now, yes.

5 Q. Yes, you have seen the list.

6 And is it your testimony that none of your prior
7 attorneys ever provided you a copy of that list?

8 A. I don't remember seeing that list.

9 Q. And at the time, in 2014, that's when the list was
10 created, right? Those were Plaintiff's search terms. The
11 only way your lawyers could have gotten those e-mails is
12 calling you, right?

13 A. Correct.

14 Q. And your testimony is they never did that?

15 A. That's correct.

16 Q. Okay. And did you -- all the times they did ask you for
17 e-mails -- sorry.

18 All the times they asked you to search for responsive
19 e-mails, you downloaded a copy, right? Is that what you
20 described?

21 A. Yes, for sure.

22 Q. I just want to understand the process.

23 And you saved that to your computer, right?

24 A. Yes.

25 Q. Is that your laptop?

1 A. Correct.

2 Q. The one you still have?

3 A. Correct.

4 Q. And have you saved all of those instances of finding
5 e-mails and saving them?

6 A. Yes.

7 Q. Okay. And you still have them today?

8 A. Yes.

9 Q. And have you turned them all over to the ESI vendor?

10 A. They would have been turned over in that initial discovery
11 because they would have been saved on my hard drive. So the
12 initial discovery, they would have come up because --

13 Q. I just want to make sure -- I'm sorry.

14 Let me make sure I understand. When you say "the
15 initial discovery," you mean back in 2014?

16 A. When they searched my computers in 2014, 2015?

17 Q. Yes.

18 A. Yes, when they searched my computers, all of the things I
19 saved would have been on my computer, so there would have been
20 a lot of e-mails.

21 Q. And those would have been on your hard drives?

22 A. Exactly.

23 Q. All right. And after those images were made, did you
24 continue to search for e-mails and save them on your hard
25 drive after December of 2014?

1 A. Whenever I was asked, yes.

2 Q. And you continued to save those on your computer, right?

3 A. Yes.

4 Q. None of those would be on the images that were taken by
5 4Discovery at that time, though, right, because they took a
6 copy of your hard drives and left with it?

7 A. Yes, and any of the postdates.

8 Q. Any postdates.

9 The stuff that postdates that, have you retained
10 copies of all those files?

11 A. Absolutely, yes.

12 Q. And have you turned all that over to your new ESI vendor?

13 A. Yes, they have gone through my computers, again, so, yes,
14 they would have all that.

15 Q. And did you retain all the e-mails that you forwarded
16 these results of your e-mail search to your prior counsel?

17 A. I'm confused.

18 Can you repeat the question, please?

19 Q. You did the search for your attorneys, right?

20 A. Correct.

21 Q. You saved it on your computer, right?

22 A. Yes.

23 Q. And then you sent it to your attorneys somehow?

24 A. E-mail, yes.

25 Q. E-mail.

1 You would attach it?

2 A. Yes, put it in a folder, zip file, and send it.

3 Q. Zip file and send it.

4 And it was easy to do?

5 A. Yes.

6 Q. And did the attorneys ever report to you that they didn't

7 get it?

8 A. Not -- I don't remember them ever saying that.

9 Q. Okay. Focusing on those search terms, we talked earlier
10 today about what I called a "court-ordered phone conference,"
11 and I asked you if you recalled that. That was in the middle
12 of -- it was in June of 2014.

13 You recall participating in that?

14 A. I do recall participating, yes.

15 Q. Did you understand that that was a court-ordered
16 conference required by Judge Johnston in this case?

17 A. You said that earlier. I don't recall my state of mind at
18 that point. I may have known that. I may not have known
19 that.

20 Q. Do you recall your attorneys telling you: "We have to
21 participate in this pursuant to a court order from the Judge"?

22 A. I just did what my attorneys told me. They said, "Come to
23 the call." I don't recall the details they gave me.

24 Q. And did you understand or recognize it as an important
25 phone call?

1 A. Of course.

2 Q. Okay. And did you recognize the focus of that conference
3 or phone call was going to be to review ESI and -- ESI that is
4 stored and searching it and producing it in this case?

5 A. I don't recall. I don't have a lot of experience with
6 this, so I don't recall exactly what my frame of mind would
7 have been in a call like that. It would have been a little
8 overwhelming for me, so I'm not sure what I was thinking.

9 Q. Okay. Do you recall meeting and speaking to your
10 attorneys about and preparing for this conference about the
11 time, or before June 2014, to prepare for it?

12 A. I don't necessarily remember preparing for it. I remember
13 being in the room with them.

14 Q. And who was in the room with you?

15 A. I don't even remember who was in the room. I remember on
16 the conference call, I'm pretty sure Tom Leavens was there. I
17 believe someone else was there with him. I can't remember if
18 it was Heather or Travis. I remember there was lawyers on the
19 phone. I can't remember if the Judge was on the phone. I do
20 not remember. I know there was a lot of people on the call.
21 And as I said, the only thing I really recollect from that
22 meeting was "Go home and get Carbonite and back everything
23 up."

24 Q. Is that something you recognized yourself or did someone
25 tell you to do that?

1 A. There seemed to be disbelief in the room that I was not
2 copying my files or storing my files or had some backup, so I
3 immediately went and took care of that.

4 Q. And explain that to me. What do you mean there was
5 disbelief in the room?

6 A. Everyone was saying, "We back up our files, we back up our
7 files, we back up our files." They got to me, and I was not,
8 so I resolved that by backing up my files.

9 Q. I asked you earlier if you recall fully participating in
10 that conference.

11 Do you have any recollection about that?

12 A. I don't recall.

13 Q. Do you recall whether or not your attorneys allowed you to
14 speak in that conference or prohibited you from speaking?

15 A. As I stated before, I really don't recall anything else
16 from that call, other than "Go home. Download Carbonite."

17 Q. And you don't recall from that conference that you were
18 then obligated to preserve certain -- continue to preserve
19 your electronically stored information and get ready to search
20 it and produce it?

21 A. Again, I don't recall exactly. I know that I was told to
22 go and make sure that I backed up everything.

23 Q. And you have already described what you did with
24 Carbonite, and I just want to be clear: You are still using
25 Carbonite; is that right?

1 A. Yes.

2 Q. Okay. One of the things that your attorneys have said in
3 their motion -- I should say in the response to our motion to
4 amend our summary judgment, one of the first times we filed
5 for sanctions, your attorneys said in their court papers that
6 they filed: "At all relevant times, 21 Century Smoke had been
7 advised to preserve any and all of its electronic records
8 relative to this matter"?

9 A. Are you talking about yourself or me? You said "21
10 Century Smoke."

11 THE COURT: You said "smoke."

12 MR. DAVIS: I did, but I'm reading what was in the
13 brief.

14 THE COURT: Okay.

15 MR. DAVIS: So let me just -- I will correct it.

16 BY MR. DAVIS:

17 Q. So at all relevant times, your company had been advised by
18 your attorneys to preserve any and all of its electronic
19 records relative to this matter?

20 A. Correct.

21 Q. That's correct?

22 A. Yes.

23 Q. And that statement is true?

24 A. Yes.

25 Q. Okay. And you reviewed and approved this filing with that

1 statement?

2 A. I do not even know what filing you are talking about, but
3 that is a correct statement.

4 Q. Okay. When this was filed in April of 2018, your
5 attorneys filed supporting declarations.

6 Do you have any recollection of that?

7 A. I do not.

8 MR. DAVIS: I ask to have Docket 253 brought up on
9 the screen, please.

10 Thank you. Exhibit 64.

11 BY MR. DAVIS:

12 Q. I ask you to take a look at that. That's on the screen.
13 Tell me if you recognize it.

14 A. In my preparation for this, I do recognize it. I don't
15 recall seeing it previously.

16 Q. Do you recall if you reviewed and approved it in or about
17 May 14th of 2018?

18 A. I don't recall ever seeing it, so no.

19 Q. Before your preparation for this hearing today?

20 A. Exactly.

21 Q. So you never saw this declaration at the time?

22 A. I don't recall seeing it. I'm not saying I didn't see it.
23 I do not recall seeing it.

24 Q. So to prepare for today, you reviewed Plaintiff's
25 Exhibit 64; is that right?

1 A. Yes.

2 Q. And when you read it, is there anything in there that
3 refreshes your recollection as to whether or not you saw it at
4 the time it was prepared and filed with the court?

5 THE WITNESS: Can you scroll down the page?

6 MR. SALAM: Your Honor, I'm going to object, asked
7 and answered.

8 THE COURT: Well, he is, essentially, showing him the
9 document to see if it refreshes his recollection on whether he
10 saw it before. So I will overrule the objection. I don't
11 know what his answer is going to be.

12 THE WITNESS: I don't recall seeing this document,
13 no, until recently.

14 THE COURT: Until preparing for today's hearing?

15 THE WITNESS: Yes.

16 THE COURT: Okay.

17 THE WITNESS: Thank you, your Honor.

18 BY MR. DAVIS:

19 Q. And as part of this case, did there ever come a time when
20 you personally sat down with Mr. Leavens and accessed your
21 online e-mail accounts in his presence?

22 A. Yes.

23 Q. And when did that happen for the first time?

24 A. Late 2012, early 2013.

25 Q. Okay. And where were you when that happened?

1 A. In Chicago at 1535 North Ashland.

2 Q. Is that Mr. Leavens's office?

3 A. No, that's where the warehouse -- that's where our
4 headquarters were.

5 Q. So Mr. Leavens came to you?

6 A. Yes.

7 Q. Okay. And was there any other attorney with you?

8 A. I believe it was just him.

9 Q. And he sat with you at that time, is that right, and you
10 reviewed your online accounts with him?

11 A. Correct.

12 Q. Okay. And this was in 2012?

13 A. It would have either been late 2012 or early 2013. I
14 believe it was 2012.

15 Q. Okay. And describe for me what you showed him on your
16 computer regarding your online accounts at that time in that
17 first meeting.

18 A. I don't recall if it was the first or the second meeting
19 or if there was a second meeting. I know one of the times he
20 came. I believe it was the first meeting we went through like
21 the confusion customer e-mails. I showed him the different
22 confusion customer e-mails, and we just kind of went over how
23 I was going to get these to him. So save them, send them to
24 him, that kind of thing.

25 Q. Right.

1 And when you say you showed them to him, did you have
2 them printed out in manila folders, in paper, or did you have
3 your computer open, and you were showing him live while you
4 were searching and looking at the e-mails live on your online
5 account?

6 A. He sat with me at my laptop, and we went into my different
7 e-mail accounts and looked at the different instances of
8 confusion and other things I was showing him.

9 Q. And he saw you accessing like your online Yahoo! e-mail
10 account?

11 A. Yes.

12 Q. And he saw you putting in the search terms and searching
13 for e-mails that responded to whatever terms you put in the
14 search bar?

15 A. And going to different folders that we had stuff saved in,
16 yes.

17 Q. Right.

18 And the folders would have been on the online e-mail
19 account?

20 A. Yes.

21 Q. Not folders on your computer, right?

22 A. Exactly, exactly.

23 Q. Right.

24 And did you explain to your attorney at that time the
25 difference between stuff being online and stuff being on your

1 computer?

2 A. No.

3 Q. Okay. Did he ask you anything about that?

4 A. No.

5 Q. And why didn't you explain the difference to him, if you
6 know?

7 A. I mean, in my mind, it kind of is common sense that Yahoo!
8 Mail is online. I guess everyone didn't know that or doesn't
9 know that, but in my mind, that just goes without saying. So
10 I wouldn't be just walking around describing that Yahoo!
11 e-mail is in the cloud.

12 Q. And did you access other online accounts that you had at
13 that time while you were sitting with Mr. Leavens at your
14 office, at your laptop?

15 A. The GoDaddy for sure, the support@21centurysmoking. I'm
16 not sure if we went into the bduke, but we for sure went into
17 the support.

18 Q. And that was, again, you accessed your GoDaddy e-mail
19 online, right?

20 A. Correct.

21 Q. You didn't use any application like Office that was
22 resident on your computer?

23 A. I don't have anything like that, no.

24 Q. Right.

25 And after that first time, you showed Mr. Leavens on

1 your computer the online accounts, how many times after that
2 did you actually sit with him at your computer and show him
3 your online accounts?

4 A. I don't recall. I remember one time specifically. I
5 don't know if there were other times.

6 Q. Did you ever do it at his office, on any of his computers?

7 A. I don't believe so.

8 Q. Did you ever do it on any other computer with him, other
9 than your laptop?

10 A. Possibly my wife's computer, the desktop.

11 Q. At your house --

12 A. Yes.

13 Q. -- or your office?

14 A. Yes.

15 Q. Right. Okay.

16 MR. DAVIS: Judge, this might be a time for a short
17 break. I'm trying to move a little forward and transition
18 into another topic.

19 THE COURT: That's fine. Okay. We will take a quick
20 break.

21 MR. DAVIS: Thank you.

22 (Recess taken.)

23 THE COURT: All right. Before we get started, I
24 assume at some point somebody is going to explain to me why 4D
25 did not search the web-based e-mails. I assume that's going

1 to be explained to me at some point in a day and a half.

2 All right. Go ahead.

3 MR. DAVIS: Thank you, your Honor.

4 BY MR. DAVIS:

5 Q. You testified earlier about your new ESI vendor, right,
6 QDiscovery?

7 A. Yes.

8 Q. And --

9 MR. SALAM: There is QDiscovery, which is now Xact
10 Data, which is our current --

11 THE COURT: Hold on a second.

12 MR. SALAM: I'm sorry. I want to clarify for the
13 record.

14 THE COURT: Okay. Hold on.

15 MR. SALAM: I'm sorry.

16 THE COURT: Okay. Go ahead.

17 MR. SALAM: The discovery vendor we have been talking
18 about is 4Discovery, not to be confused with QDiscovery, who
19 did the status report -- or who is our e-discovery provider --

20 THE COURT: Right.

21 MR. SALAM: -- and did the status report. I just
22 wanted to make sure.

23 MR. DAVIS: Right. That's Plaintiff's Exhibit 66 in
24 evidence.

25 MR. SALAM: Okay. Sorry to interrupt. I just

1 thought you were --

2 THE COURT: I know he is from a different place, but
3 I did start with a question. Maybe it is a rhetorical. At
4 some point, I would assume someone is going to tell me why 4D
5 didn't do what is pretty basic stuff.

6 BY MR. DAVIS:

7 Q. Mr. Duke, your new ESI vendor is QDiscovery, right?

8 A. Yes.

9 Q. And they are the ones that submitted the report to the
10 court that's Plaintiff's Exhibit 66, that was the August 13,
11 2019, report we discussed?

12 MR. SALAM: Objection to the form of the question.
13 Counsel submitted the report. We did attach an affidavit from
14 the head of forensics.

15 THE COURT: All right. Why don't you just rephrase
16 the question.

17 QDiscovery is your current ESI vendor, right?

18 THE WITNESS: Yes.

19 BY MR. DAVIS:

20 Q. And in connection with that, you were interviewed by them,
21 right?

22 A. Yes.

23 Q. All right. And as part of that interview, was it a
24 conversation face-to-face?

25 A. Yes.

1 Q. And did they come to your offices and do that?

2 A. We did it in Chicago.

3 Q. And did you also exchange e-mails with them?

4 A. I do not recall. It was a face-to-face discussion in
5 Chicago.

6 Q. And that interview was to find out about all the sources
7 of electronic data that you and your company had; is that
8 right?

9 A. Correct.

10 Q. All right. And my question is did you ever have that same
11 type of interview with your prior attorneys at any time?

12 A. No.

13 Q. Did you ever have that type of interview with your first
14 or a prior e-discovery vendor 4Discovery?

15 A. No.

16 Q. You never had an interview or a meeting with people from
17 4Discovery about all the sources of your electronic data?

18 A. No.

19 Q. Okay. And we know from the report that we were just
20 talking about and your new vendor, QDiscovery, that there are
21 more sources of electronically stored information that you
22 have outside of the four computers that 4Discovery copied and
23 searched?

24 A. Correct.

25 Q. Right?

1 A. Yes.

2 Q. And my question is -- and I'm going to ask the Judge's
3 question, but my question is was it you alone that decided not
4 to search all those additional sources of electronically
5 stored information in 2014 and just search the four hard
6 drives?

7 MR. SALAM: Objection, your Honor. There is no
8 foundation that he made any decision with respect to what was
9 searched.

10 THE COURT: Did you decide what to search in 2014?

11 THE WITNESS: No, no.

12 THE COURT: Who did?

13 THE WITNESS: My lawyer said they were going to
14 search the four computers that were in my office.

15 THE COURT: And did you tell your attorneys, any
16 attorneys, other than your current attorneys, about the
17 web-based e-mails?

18 THE WITNESS: I mean, they all knew that I had these
19 e-mail accounts.

20 THE COURT: Did you tell them about those?

21 THE WITNESS: Yes.

22 THE COURT: Okay. Did you tell them that you
23 communicated about work on those web-based e-mail systems?

24 THE WITNESS: I had communicated with them through
25 those systems, so, yes, they knew I was using them.

1 THE COURT: All right. But did you tell them that
2 you used those web-based e-mails --

3 THE WITNESS: Yes.

4 THE COURT: -- for work?

5 Okay. Go ahead. Keep asking, Mr. Davis.

6 MR. DAVIS: Thank you, your Honor.

7 Could I have Exhibit 64 displayed on the screen?

8 THE COURT: Mr. Davis, I interrupted you. I don't
9 know if you said that you were going to ask my question or you
10 were not going to ask my question.

11 MR. DAVIS: I thought you just asked it.

12 THE COURT: I didn't ask about 4D.

13 Did 4D or 4Discovery ever ask you about your
14 web-based e-mail systems?

15 THE WITNESS: No.

16 THE COURT: Did you ever tell 4D or 4Discovery about
17 your web-based e-mail systems?

18 MR. SALAM: Your Honor, I --

19 THE COURT: Don't -- are you going to object to my
20 question?

21 MR. SALAM: No.

22 THE COURT: Okay. Well, then let the witness answer
23 my question.

24 THE WITNESS: No, I did not ever discover -- or I
25 never discussed with 4Discovery really anything. They just

1 were the company that were going to be searching the four hard
2 drives.

3 THE COURT: Okay. Mr. Salam, you wanted to say
4 something?

5 MR. SALAM: Not anymore, your Honor. The witness
6 spoke clearly.

7 THE COURT: Okay. Go ahead, Mr. Davis.

8 BY MR. DAVIS:

9 Q. Drawing your attention to Plaintiff's Exhibit 64 that's in
10 front of you, can you take a look at that?

11 And I direct your attention -- take your time looking
12 at it. It is the declaration of your prior attorney Thomas
13 Leavens.

14 Do you see that on the first page?

15 A. Yes, it is the one we were previously looking at.

16 Q. It is.

17 A. Yes.

18 Q. And it was filed under Docket 253-1.

19 I ask you to take a look at Paragraph 10, and can you
20 read that out loud?

21 A. "During the summary judgment filings, I came to learn that
22 Mr. Duke's personal yahoo.com e-mail address,
23 brentduke@yahoo.com, were not subject to search terms DR
24 submitted. I have also come to learn that the reason for this
25 is that Mr. Duke accessed his e-mail account through a web

1 browser. At no time was I or my team ever aware, nor were we
2 advised by our e-discovery vendor, nor Plaintiffs or their
3 e-discovery vendor, that this was an issue to watch out for
4 that might affect search results and the context of
5 e-discovery and search terms."

6 THE COURT: Is somebody from 4D going to testify?

7 Anybody got them under subpoena?

8 MR. DAVIS: We have them on our witness list, not
9 under subpoena.

10 THE COURT: Okay. All right. That's all.

11 Go ahead.

12 BY MR. DAVIS:

13 Q. And after reading that, did you -- when did you first
14 learn about this statement made in this May 14th, 2018,
15 declaration of your prior attorney Tom Leavens?

16 A. My lawyers explained to me that they were needing my
17 e-mail address to search for my brentduke@yahoo e-mails.

18 Q. Do you understand from this statement the distinction
19 Mr. Leavens is making about where the data resides?

20 Do you understand the distinction he is making?

21 A. Yes.

22 Q. And what's the distinction?

23 A. That I had to access it through a web browser.

24 Q. And he is making the statement to the court on May 14th of
25 2018, right?

1 A. Correct.

2 Q. And he is confirming that your Yahoo! e-mail address had
3 never been subject to the search terms that you just
4 described, right?

5 A. Correct.

6 Q. Okay. And do you understand why that was never done based
7 on this paragraph?

8 A. No, I do not.

9 Q. Okay. Were you surprised to learn, when you first saw
10 this, that your attorneys didn't know the difference between
11 information that's on a computer versus on a web-based
12 application or online?

13 MR. SMITH: Objection, your Honor.

14 MR. DAVIS: If you know.

15 MR. SMITH: Objection, your Honor. Again, seeks to
16 ask the witness to peer into somebody else's mind and
17 understanding.

18 THE COURT: I will overrule because the question is
19 "Were you surprised to learn, when you first saw this, that
20 your attorneys didn't know the difference between information
21 on a computer versus on a web-based application," and based
22 upon his prior testimony, I think I know what his answer is.

23 So objection overruled.

24 Do you want me to read back that question?

25 THE WITNESS: I was surprised to learn, of course.

1 THE COURT: Okay.

2 BY MR. DAVIS:

3 Q. All right. And you had previously disclosed those online
4 accounts to your prior attorneys?

5 A. Yes.

6 Q. And you had sat with Mr. Leavens and showed him your
7 online accounts?

8 A. Yes.

9 Q. And so I understand your testimony, did your prior
10 attorneys bring this to your attention in May of 2018, when
11 the problem arose?

12 A. Well, I mean, in March of 2018, I believe, is when they
13 brought to my attention that there was a problem. I believe
14 that by May, they had figured out what the problem was.

15 Q. Okay. And then is it in March of 2018 when you and your
16 company hire 4Discovery to access your Yahoo! e-mail account
17 and search it for the first time?

18 A. I don't think so.

19 Q. Okay. Do you know when that happened for the first time,
20 when 4D accessed and got credentials for your Yahoo! e-mail
21 account and got the data --

22 A. My apologies. 4D is the old company, 4Discovery.

23 Q. It is.

24 A. Yes, so then they got access.

25 My apologies. My last answer was incorrect.

1 4Discovery did do the search around that time.

2 Q. And what time is that?

3 A. I believe May of 2018.

4 Q. And that was the first time that your entire Yahoo! e-mail
5 account had ever been copied and searched using the ESI search
6 terms, right?

7 A. Correct.

8 Q. Okay. Now, directing your attention to March of 2018,
9 again, after those searches were done, right -- we just talked
10 about 4D runs the searches, puts the terms in of your Yahoo!
11 e-mail account. And do you recall how many pages of e-mail
12 documents were produced to us on June 1st, 2018?

13 A. I never saw it.

14 Q. All right. I can tell you it was over 15,000 pages.

15 Have you heard that or do you have any recollection
16 about that?

17 A. No.

18 Q. But you knew it was a lot of e-mails, right?

19 A. Upon seeing these search terms that you guys had, that
20 they are extremely broad, so that's not surprising.

21 Q. Okay. And I want to turn your attention to the night of
22 March 19th, 2018, and do you recall the e-mails earlier
23 between you and Mr. Life?

24 A. Okay, yes.

25 Q. Do you remember that weekend, March 17th? It is a

1 Saturday.

2 A. Okay, yes.

3 Q. Okay. You had already looked at the e-mail from him?

4 A. Yes.

5 Q. And he asked you to run a search for Kirti/Webrecsol
6 e-mails, right?

7 A. Yes.

8 Q. And what was your answer to him; do you recall?

9 A. I don't remember my exact term. Yes, I went and did it.

10 Q. We can bring it up again, but you saw you had hundreds of
11 e-mails?

12 A. Hundreds of e-mails, and I asked him if he wanted the
13 password.

14 Q. Right.

15 And you were aware at that time that my clients,
16 Plaintiffs, were claiming that you and your company were
17 withholding documents in this case, right?

18 A. Yes.

19 Q. Okay. And what I want to know is out of those 15,000
20 documents that were produced from your Yahoo! e-mail account
21 on June 1st of 2018, whose decision was it just to pull out
22 those 112 documents that were actually e-mailed to our team on
23 the evening of March 19, 2018?

24 MR. SALAM: I'm going to object.

25 MR. DAVIS: Do you know what I'm talking about?

1 MR. SALAM: I'm sorry, your Honor.

2 THE COURT: Hold on a second.

3 Go ahead.

4 MR. SALAM: I'm going to object on foundation. There
5 is a lot in that question that is not established or that I
6 think there needs to be foundation questions about.

7 THE COURT: First of all, are you aware that -- you
8 are aware that there were a lot of documents, I think you
9 said, and you were not surprised that there was 15,000
10 documents?

11 THE WITNESS: No.

12 THE COURT: I don't know if it is pages or documents.

13 You weren't surprised by that?

14 THE WITNESS: No.

15 THE COURT: Do you know how those documents were
16 produced to the Plaintiff?

17 THE WITNESS: How they were produced?

18 THE COURT: Yes, when they were produced, in what
19 format. Were you involved in the production of those
20 documents?

21 THE WITNESS: No.

22 THE COURT: Turning those documents over to the
23 Plaintiff?

24 THE WITNESS: No, I just gave my e-mail credentials,
25 and they handled it.

1 THE COURT: And then you were done with it?

2 THE WITNESS: Yes.

3 THE COURT: Okay. So at the time of the briefing,
4 you didn't search through those 15,000 pages and say, "Here,
5 turn these ones over" or anything like that?

6 THE WITNESS: They asked me for specific things. So
7 it was for very specific -- so it was like Saraswat, Kirti.

8 THE COURT: Of the 15,000, they asked you for
9 specific ones?

10 THE WITNESS: No, that March e-mail was asking me for
11 these four things. So I looked up those four things, which
12 then produced 100 documents. They didn't say, "Look for these
13 20 search terms." That would have produced --

14 THE COURT: Right. So those were two different
15 things. You did search for the Saraswat documents, which
16 turned up 100.

17 We still haven't talked about the Wood's issue, which
18 is floating around somewhere in this room.

19 But the 15,000 that were produced after 4D went into
20 your web-based programs, were you involved in turning any of
21 those over to the Plaintiff?

22 THE WITNESS: No.

23 THE COURT: Did you have any discussions with counsel
24 about which documents to turn over, which documents not to
25 turn over?

1 THE WITNESS: No.

2 THE COURT: All right. Was it your assumption that
3 they would all be turned over?

4 THE WITNESS: Unless there was privileged stuff that
5 they were withholding.

6 THE COURT: Okay. Go ahead, Mr. Davis.

7 MR. DAVIS: Thank you.

8 BY MR. DAVIS:

9 Q. And on that e-mail you sent with your prior attorney
10 Mr. Life on March 17th, you said you had hundreds of e-mails,
11 right?

12 A. Correct.

13 Q. Correct.

14 All right. And then are you aware that two days
15 later, there was a production of e-mails made by your
16 attorneys to the Plaintiffs, to our firm, on the 19th?

17 A. Yes, that's correct.

18 MR. DAVIS: Okay. And can we have Plaintiff's
19 Exhibit 1 on the screen?

20 BY MR. DAVIS:

21 Q. I ask you to take a look at this e-mail and tell me if you
22 are familiar with it.

23 A. I have seen it in preparation for today.

24 Q. And were you aware of it being sent on or about March 19th
25 of 2018?

1 A. No, I'm not attached on this or anything. It is not sent
2 to me.

3 Q. Okay. And attached to this document, as you can see, if
4 we scroll to the next page, is what?

5 Do you recognize that document?

6 A. It's an invoice from Kirti Saraswat.

7 Q. And it was sent to your Yahoo! e-mail account?

8 A. Correct.

9 Q. On March 31st, 2009, right?

10 A. Yes.

11 Q. And the next page, what's this?

12 A. It must have been some type of attachment to an e-mail.

13 It is an invoice.

14 Q. From?

15 A. Kirti Saraswat, Webrecsol.

16 Q. And that's sent to your brentduke@yahoo.com account?

17 A. Correct.

18 Q. All right. And underneath that, it says a website, too.

19 Is that your website?

20 A. Yes.

21 Q. Okay. That's www.brentduke.com, right?

22 A. That is the old word for 21centurysmoking.com. I don't
23 know why it says that.

24 Q. Do you recall -- when you responded to Mr. Life, you wrote
25 "hundreds of e-mails."

1 Is it your recollection that you sent him all of
2 those hundreds of e-mails?

3 A. I do not recall exactly what was sent. I sent
4 whatever -- I discussed with him what to send, and I sent
5 whatever I was told to send.

6 Q. And did you have any discussion with your attorneys about
7 what to remove from that production, if anything, before it
8 was produced to Plaintiffs in the case?

9 A. I do not recall. There may have been auto-responses or
10 something that weren't actual e-mails that may have been in
11 there or something like that. That's the only thing I could
12 think that wouldn't have been produced.

13 Q. And going back to the first page of this document, this is
14 an e-mail from your prior attorney Mr. Stamatis, right, to me
15 and to my colleagues, right, copying your other attorneys; is
16 that right?

17 A. Yes.

18 Q. All right. And you can see that it has an attachment; do
19 you see that? At the top, it says "Attachments" under
20 "Subject"?

21 THE COURT: Under "Subject," in the header.

22 THE WITNESS: Okay. Sorry, yes.

23 MR. DAVIS: Right?

24 BY MR. DAVIS:

25 Q. It says "From," "Sent To," "Cc," and "Attachments"?

1 A. Yes.

2 Q. And it has got those numbers for the documents, which you
3 referenced before?

4 You know what those are, right?

5 A. Yes.

6 Q. And so these are numbers on your documents being produced,
7 right?

8 A. Correct.

9 Q. And it says the number ranges from 63515 to 63626, right?

10 A. Yes.

11 Q. And is that about 112 pages?

12 A. Or 112 documents. I don't know how this works, but, yes,
13 112.

14 Q. Yes, each page gets a number, right?

15 A. 111, 112, whatever.

16 Q. Okay. And your e-mail said there were hundreds of
17 e-mails. Do you have a recollection if that was about 112
18 pages of information or is it more than that?

19 A. I don't recall if I was using hyperbole or if there were
20 hundreds of e-mails or if there is e-mails that were just
21 Kirti Saraswat replied, but there wasn't actually anything
22 there. It was just "Thank you," but it wasn't a real e-mail.
23 It was an auto-generated e-mail. So it could have been a
24 bunch of false ones that popped up potentially.

25 Q. So you don't know --

1 THE COURT: What do you mean by "false ones"?

2 THE WITNESS: So, like, if I e-mailed her, and she
3 replies to me, I would probably have included that, but if I
4 e-mailed her, and her reply was just an auto-reply that wasn't
5 actually her replying, I probably wouldn't have, at the time,
6 copied that.

7 THE COURT: Okay. Thank you.

8 BY MR. DAVIS:

9 Q. The auto-reply, what does that mean?

10 THE COURT: Like an out of office, right?

11 THE WITNESS: She has a literal auto-reply to
12 everything. So there is an auto-reply that comes to each
13 e-mail. So it says: "Thank you for e-mailing me. Thank you
14 for e-mailing me." As soon as you send an e-mail to her, you
15 get an e-mail back saying: "Thank you for e-mailing me."

16 MR. DAVIS: I got you.

17 BY MR. DAVIS:

18 Q. And as you sit here today, you don't have a recollection
19 of how many pages that search result for e-mails that you
20 e-mailed your prior attorney Mr. Life about; is that right?

21 A. I imagine it is 111, whatever is here.

22 Q. All right. And we could check that because you saved that
23 file to your hard drive on your computer, right?

24 A. And I sent an e-mail to him with the attachment, so you
25 could count whatever is in that e-mail.

1 Q. And are you aware of any -- that your attorneys removed or
2 withheld any documents from that production before -- when
3 they received it from you, and before they sent it to me?

4 Did they remove any e-mails from that or documents;
5 do you know?

6 A. I don't think they did. They didn't tell me they did.

7 Q. Okay. And other than Mr. Life, did you e-mail or speak to
8 any of the other prior attorneys that weekend of March 17, 18,
9 or 19 in connection with this production of these documents?

10 A. I do not recall.

11 MR. DAVIS: Can I have Defendants' Exhibit 5, please?

12 BY MR. DAVIS:

13 Q. I'm going to have you take a look at your prior attorney
14 Travis Life's declaration of May 15, 2018. This is just two
15 months after the weekend you searched for those e-mails. It
16 was filed under Docket 253-2. This is already, I believe, in
17 evidence.

18 A. Yes.

19 Q. And could I have you take a look at Paragraph 11, please?

20 Could you read that, please?

21 A. "The Yahoo! e-mail existed in 2009, when Mr. Duke started
22 21" --

23 THE COURT: Wait. Slow down a little bit.

24 THE WITNESS: Sorry.

25 THE COURT: That's okay.

1 THE WITNESS: "The Yahoo! e-mail existed in 2009 when
2 Mr. Duke started 21 Century Smoking, and he continued to use
3 it on occasion for company business after his business e-mail
4 support@21centurysmoking.com and bduke@21centurysmoking.com
5 came into existence.

6 "On March 14th, 2018, I contacted Mr. Duke via e-mail
7 to schedule a call regarding Plaintiff's claim of missing
8 documents. I spoke with Mr. Duke the following day. I
9 requested that Mr. Duke research his brentduke@yahoo.com
10 e-mail to locate any and all e-mails related to Ms. Wood, a
11 confused customer; Kirti Saraswat and Webrecsol; and the
12 requested correspondence with Frank Gu.

13 "Mr. Duke was unable to locate any e-mails related to
14 Ms. Wood, but did find e-mails related to Kirti Saraswat and
15 Webrecsol, and the reply to Frank Gu, a supplier,
16 correspondence. Mr. Duke produced those e-mails to me on
17 March 17th, 2018, and March 18th, 2018."

18 BY MR. DAVIS:

19 Q. Is that an accurate statement?

20 A. I believe so, yes.

21 Q. Okay. And, again, so he calls you on March 15th, and you
22 spoke to him directly, right?

23 A. Yes.

24 Q. Okay. And do you recall what you spoke about?

25 A. Hold on a second.

1 On this, it says on March 14th. Okay.

2 So we spoke on the phone on the 15th.

3 Okay. I'm sorry.

4 So, yes, we spoke about locating these e-mails on the
5 15th, then.

6 Q. All right. And he had to contact you because he knew you
7 were the one, the only one, that could search and find e-mails
8 on your online e-mail accounts, right?

9 A. I wouldn't say I'm the only one. Anyone with my password
10 could, but I'm the only one with the password. So, yes, at
11 that moment in time, but he could have gotten the password
12 from me and searched them, yes.

13 Q. And did he get the password from you?

14 A. No.

15 Q. Did you offer it to him?

16 A. I believe there is an e-mail in here where I say, "Do you
17 want the password?" So, in theory, he could have used the
18 password.

19 Q. Okay. And at this time, he knows he is asking you
20 to -- and I think the word he uses in here, in the middle,
21 is -- "re-search" your yahoo.com account, right?

22 So he had already previously spoken to you about
23 searching that e-mail account, right?

24 A. I was constantly searching for e-mails, yes.

25 Q. Constantly. Okay.

1 And, do you know, did your attorneys say anything to
2 you about not disclosing to the court this problem that they
3 identified at this time --

4 A. Can you repeat that?

5 Q. -- about not having searched the Yahoo! e-mail accounts?

6 A. Can you repeat that?

7 Q. Yes.

8 Do you know if your -- do you recall your attorneys
9 telling you about whether or not they were going to disclose
10 to the court the problem they had identified about not having
11 searched the Yahoo! e-mail accounts?

12 MR. SMITH: Objection to the foundation. It assumes
13 that the attorneys had identified the issue at that point. I
14 don't think that has been established.

15 THE COURT: It is right there in Paragraph 11. Read
16 it.

17 MR. SMITH: I have read it, your Honor. It doesn't
18 say they've identified a problem that they hadn't previously
19 been searched. It just says he asked him to search it.

20 THE COURT: Are you kidding me?

21 Objection overruled.

22 THE WITNESS: Can you please repeat the question?

23 THE COURT: Sure. Hold on one second.

24 MR. SMITH: I can explain my objection further.

25 THE COURT: I heard your objection.

1 MR. SMITH: Okay.

2 THE COURT: Mr. Duke, did you have any conversations
3 with your attorneys about what the attorneys were going to
4 tell me or not tell me about the documents that were disclosed
5 relating to Kirti Saraswat?

6 THE WITNESS: No, your Honor, I don't remember them
7 discussing strategic -- or communications with you, your
8 Honor.

9 THE COURT: Okay.

10 BY MR. DAVIS:

11 Q. Going back to Page 1 of Plaintiff's Exhibit 1, again, this
12 is the e-mail from your prior attorney Mr. Stamatis, to me, on
13 the night of March 19th.

14 Did you ever have a conversation with your attorneys
15 advising them not to disclose that your entire Yahoo! e-mail
16 account had never been searched with the ESI search terms
17 prior to March 19, 2018?

18 A. I don't think at this point anyone was aware that this had
19 happened. This is March of 2018. They were still figuring
20 out what had even gone wrong.

21 Q. And at this time, you thought you had done it, and they
22 didn't know if you had done it or not, right?

23 MR. SALAM: Object to the foundation.

24 THE COURT: Overruled.

25 THE WITNESS: I was constantly searching for e-mails.

1 So I, unfortunately, assumed that, yes, I had done whatever
2 had been asked because I didn't know what the search terms
3 were. I just knew that I was always searching through
4 e-mails, sending e-mails to my lawyers. There is a ton of
5 e-mails out there that had showed up in discovery. I thought
6 that, yes, we had done what we were supposed to do.

7 BY MR. DAVIS:

8 Q. Throughout this case, your attorneys have kept you and
9 your company apprised of all the developments in the case,
10 right?

11 A. For the most part, yes.

12 Q. Okay. When you say "For the most part," is there a
13 certain area of the case that they don't tell you about, that
14 you have now learned they should have told you about?

15 MR. SALAM: Your Honor, I'm going to object on
16 foundation grounds. I would like a little more specificity
17 and time element. A general question about a seven-year case,
18 about you have been informed in general, and then they are
19 going to assume that he knows whatever they would like to next
20 bring up.

21 I apologize for the talking objection.

22 THE COURT: The question prior was:

23 "Q. Throughout the case, your attorneys have kept
24 you and your company apprised of all the developments
25 in the case, right?

1 "A. For the most part, yes."

2 The follow-up question, which any decent attorney
3 would ask, relates to the "For the most part." He wants to
4 know what he thinks the attorneys told him and what might not
5 have been told to him, so that seems like a fair inquiry.

6 So why don't you just rephrase the question. I
7 understand where you are going. You are just trying to drill
8 down. He said, "For the most part." You want to know what
9 was told and what wasn't told. Now, it is kind of hard
10 because he isn't going to know what wasn't told to him.

11 MR. DAVIS: Well, in specific, I was asking, during
12 the course of this case, did your prior attorneys keep you
13 apprised of, for example, all the court orders that were
14 entered in this case.

15 THE COURT: Okay.

16 THE WITNESS: I don't know exactly what a court order
17 is, but this has been going on for years. Tons of things have
18 happened. There has been a lot of filings. There has been a
19 lot of hearings. I don't feel like they have literally
20 discussed every single one of these things with me, no.

21 BY MR. DAVIS:

22 Q. Okay. For example, I have -- before this hearing, your
23 attorneys produced an exhibit list, right?

24 A. Correct.

25 Q. And you worked with them on that?

1 A. Yes.

2 Q. All right. And the first exhibit on the list,
3 Exhibit No. 1, your exhibit, your company, is Judge Kapala's
4 order regarding summary judgment, June 16, 2014?

5 A. Yes.

6 Q. You are aware of that order, right?

7 A. Yes.

8 Q. Any question in your mind what it says or the contents of
9 it?

10 A. No.

11 Q. Okay. And we talked before about participating in the ESI
12 conference or the conference to talk about the discovery, the
13 electronic discovery.

14 Do you recall that?

15 A. Yes.

16 Q. And were you aware that that was a court-ordered
17 conference?

18 A. I believe I told you before I didn't know exactly what it
19 was. I didn't even know it was an ESI conference. I don't
20 have a recollection of that. I just remember being in a
21 meeting, leaving there, downloading Carbonite.

22 Q. During the course of the case, did your attorneys ever
23 tell you -- your prior attorneys ever tell you that Plaintiffs
24 had made motions seeking you and your company, to compel them,
25 to produce certain documents that hadn't been produced?

1 Do you recall that?

2 A. I do recall them mentioning it, but they didn't believe,
3 to the best of my knowledge, that there were things that had
4 not been produced.

5 Q. All right. And what I'm talking about now is not recent
6 events, but I'm talking about in 2015.

7 Do you recall that?

8 A. I'm saying that I don't believe at any point my attorneys
9 felt that stuff had not been produced.

10 Q. All right. Are you aware --

11 THE COURT: But the question is do you recall having
12 conversations with your attorneys about them claiming that
13 e-mails had not been produced?

14 Do you understand the distinction?

15 He is asking you whether or not you talked to your
16 attorneys about them squawking, complaining, and making
17 allegations that e-mails and ESI and chats had not been
18 produced.

19 THE WITNESS: I can't tell you the first time that I
20 was told about this. I don't recall if it was in 2015 or -- I
21 know, obviously, recently I have heard about it. I don't
22 recall the first time that I was made aware that this was an
23 issue.

24 THE COURT: Okay. And for the record, "squawking,
25 complaining, and making allegations" isn't being used as a

1 disparaging term. I think it has been established they had a
2 pretty good basis for squawking, complaining, and making
3 allegations.

4 So go ahead.

5 MR. DAVIS: Thank you, your Honor.

6 BY MR. DAVIS:

7 Q. I'm specifically asking you about a June 11, 2015, order
8 entered by Magistrate Johnston which ordered your company to
9 produce certain documents.

10 Are you aware of that?

11 A. I would have to see the order.

12 MR. DAVIS: Can you bring up Docket 132, please?

13 BY MR. DAVIS:

14 Q. What is being displayed is Docket Entry 132. I ask you to
15 take a look at it and tell me if you recognize it or have ever
16 seen it before.

17 A. It does not look familiar, no.

18 Q. It doesn't look familiar?

19 A. No.

20 Q. Do you recall reviewing it to prepare for today's hearing?

21 A. No.

22 Q. Okay. Do you recall in or about June of 2015
23 investigating or doing anything in connection with searching
24 and producing documents in this case for your prior attorneys?

25 A. As I have said before, numerous occasions, I was doing the

1 investigations for my attorneys. I don't know specifically
2 the dates that I was doing them.

3 Q. And the best way for you to determine when and what you
4 did would be looking at your e-mails and the date on your
5 computer, right?

6 A. Of course.

7 Q. Okay. And I'm going to direct your attention now to and
8 ask you to look at Plaintiff's Exhibit 55. This is an e-mail
9 from your prior attorney Travis Life, dated June 12, 2015.

10 Look at that and tell me if you recognize it.

11 A. I mean, no. It is not to me, so no.

12 Q. Have you ever seen it before?

13 A. I maybe saw it in preparing for today. I see some things
14 in there that look a little familiar.

15 Q. Okay. And is it fair to say that sitting here today, you
16 have no independent recollection if you did anything to assist
17 your attorneys with searching or gathering documents or seeing
18 if documents exist prior to June 12, 2015, when your prior
19 attorney Mr. Life issued this e-mail?

20 MR. SALAM: Objection, your Honor, that is not his
21 testimony. He has described numerous instances of --

22 THE COURT: Well, then he can say it is not fair to
23 say, right?

24 MR. SALAM: Correct.

25 THE WITNESS: Can you repeat the question?

1 MR. DAVIS: Sure.

2 THE COURT: Overruled.

3 The question was "Is it fair to say?"

4 Again, from my dealings with Mr. Duke, he is a very
5 bright, articulate individual. If a question starts out with
6 the preface "Is it fair to say, sitting here today," he's
7 smart enough to know whether it is fair to say or not.

8 Go ahead and ask your question.

9 BY MR. DAVIS:

10 Q. Is it fair to say that, sitting here today, you don't have
11 any independent recollection if you looked for documents or
12 searched for documents or assisted your prior attorneys in any
13 way, prior to June 12 of 2015, when Mr. Life wrote this
14 e-mail?

15 A. If he is saying "I will have the second supplemental
16 response to DR Distributors by Monday," that means I must have
17 helped with something.

18 Q. And that -- you are reading that from the e-mail, right?

19 A. Reading the e-mail, it looks as though something is going
20 to be presented. I can't imagine how something could have
21 been found without me searching for documents.

22 Q. Fair.

23 And the next paragraph, then, what does that one say?

24 A. I'm looking at the last paragraph.

25 Q. I'm directing you to the middle paragraph.

1 A. Okay.

2 THE COURT: The one that starts with "In regards"?

3 MR. DAVIS: Yes.

4 THE WITNESS: "In regards to the document request,
5 please be advised that no such documents exist, to our
6 knowledge, concerning SEO and Internet keyword rankings after
7 2009. Document 21C 61146, which appears to have been cut off,
8 is produced here as 21C 62780 to 21C 62783."

9 BY MR. DAVIS:

10 Q. And I'm trying to understand if you have any particular
11 awareness or recollection of you assisting your prior
12 attorneys in determining that no such documents exist at or
13 before June 12 of 2015, when they are responding to a document
14 demand and, in particular, responding to a court order
15 directing you and your company to produce certain documents.

16 A. As I stated previously, I can only surmise based on the
17 last paragraph. I have no clue about the second paragraph, as
18 it appears as though they may be going off of what was in
19 discovery, not realizing that there were these issues. They
20 were looking at the discovery documents, which had been
21 presented, and maybe looking through them again. That's the
22 only thing that I could imagine they were doing.

23 Q. And, again, the best way to determine this would be to
24 look at your own e-mails with your attorneys at this time
25 period to see what they were asking you for; is that right?

1 A. The only way I could have an accurate assessment would be
2 to look at e-mail.

3 MR. DAVIS: We move P-55 into evidence.

4 THE COURT: Any objection?

5 MR. SALAM: He has no basis to know whether or not it
6 is what it purports to be, but if Mr. Life's attorney has no
7 objection, I have no objection.

8 THE COURT: Any objection to Exhibit 55, Plaintiff's
9 Exhibit 55?

10 MR. SMITH: No, your Honor.

11 THE COURT: Okay. It will be admitted.

12 (Plaintiff's Exhibit 55 was offered and received in
13 evidence.)

14 BY MR. DAVIS:

15 Q. I want to turn back to the Yahoo! Chat messenger data.

16 Do you recall us talking about that before?

17 A. Yes.

18 Q. And one of the things I wanted to confirm was did you
19 ever, yourself, try to preserve or obtain a copy of your
20 Yahoo! Messenger chat data in this case?

21 A. My counsel attempted to get it.

22 Q. My question is did you ever try and do it yourself?

23 A. No. By the time I had discovered that the program was
24 gone, it would have been too late for me to try to do it
25 myself. So I believe the lawyers tried to do it through

1 forcing Yahoo! to comply.

2 Q. When you say the -- you say it was gone. What do you mean
3 by that?

4 A. The program didn't exist anymore.

5 Q. And it was removed from your computer?

6 A. It was within your e-mail, and now it was no longer within
7 your e-mail, which I was incredibly disappointed about because
8 I had personal instant messages from my wife and me when we
9 first met that I definitely would have wanted to save. I
10 would have saved everything in there. So, no, I was not happy
11 to learn it was gone for personal reasons.

12 Q. Do you remember when that happened?

13 A. I do not.

14 Q. Do you remember getting any notifications from Yahoo!
15 about the end of that service coming?

16 A. I do not.

17 Q. Okay. And that Yahoo! Messenger data was communications
18 between you and others regarding things to do with your
19 business, right?

20 A. It's 99.9 percent personal, so I lost a lot of personal
21 things, but there was some business stuff. I can't imagine it
22 was any more than Kirti Saraswat.

23 Q. Well, did you use it with any of your Chinese suppliers or
24 manufacturers?

25 A. No.

1 Q. That you just used Skype with?

2 A. I generally didn't even use Skype. I occasionally would
3 use Skype, but I never would use Yahoo! Mail with any of those
4 people.

5 Q. Yahoo! Mail or Yahoo! Chat?

6 A. Well, Yahoo! Chat was within Yahoo! Mail, if that makes
7 sense.

8 Q. It does make sense, but I'm trying to understand.

9 So if you have your Yahoo! e-mail account, then why
10 don't you have your Yahoo! Chat if it is within it?

11 A. Because the person in China I'm talking to isn't using a
12 Yahoo! e-mail address, so they are not going to pop up on my
13 chat window unless it is another Yahoo! customer.

14 Q. Got it.

15 And that's why you used things like Gtalk, right?

16 A. That's why I used things like Skype.

17 Q. Skype, right?

18 A. That's what I more commonly would use than Gtalk.

19 Q. And you used the instant messaging function on Skype,
20 right?

21 A. Yes.

22 Q. And has that been copied and preserved in this case?

23 A. Yes, it is on my hard drive. That saves to the hard
24 drive.

25 Q. Right.

1 And that was searched in this case, right?

2 A. Yes.

3 Q. Okay. And you still use Skype today?

4 A. It is on my computer. I wouldn't say I use it.

5 Q. Do you use any form of instant messaging today?

6 A. No, not that I can think of.

7 Q. And when did you first learn that your attorneys -- your
8 prior attorneys at the firm Leavens, Strand & Glover had lost
9 their e-mails for all attorneys for their firm from 2015
10 through April of 2016?

11 A. I can't recall when they notified me, but they did let me
12 know.

13 Q. And do you know when they let you know?

14 A. I don't recall the date, no.

15 Q. And how did they let you know?

16 A. Either a phone call or an e-mail.

17 Q. And what did they tell you?

18 A. That all of the e-mails were lost for a certain time
19 period.

20 Q. And what did you do, if anything, in response to that
21 disclosure?

22 A. I don't understand what do you mean, what did I do.

23 Q. Did you take any action in response to that disclosure to
24 you?

25 A. No, I don't know what type of action you are discussing.

1 Q. Did your prior lawyers ask you to do anything?

2 A. Not that I recall.

3 Q. Did they ask you to retrieve any e-mails from your
4 accounts and provide them with copies of the e-mails they sent
5 you during the course of the case?

6 THE COURT: Because of their e-mails being lost.

7 THE WITNESS: Yes, there were times they would ask me
8 to send them -- to look for e-mails that they had sent me,
9 yes.

10 BY MR. DAVIS:

11 Q. Let me make sure, and I'm not talking about you searching
12 your Yahoo! e-mail account, right?

13 A. I understand.

14 You are saying did they ask me to look through my
15 account for e-mails from them because they had lost e-mails?

16 Q. Yes.

17 A. Correct, yes.

18 Q. And when did that first occur?

19 A. I don't recall.

20 Q. And did you comply with the request?

21 A. Of course.

22 Q. Okay. And did they tell you that they had lost all of
23 your prior attorney Ms. Liberman's e-mails when she worked on
24 the case?

25 A. I believe that, yes, that was mentioned.

1 Q. And your prior attorneys, I think we established already,
2 you were communicating with them by Yahoo! and your GoDaddy
3 accounts, right, before they withdrew?

4 A. Correct.

5 MR. DAVIS: Your Honor, could we take a brief break?
6 I'm trying to -- a lot of the questions in my outline we have
7 answered, and if I have, like, two minutes, I can try and
8 quickly get to the next spot.

9 THE COURT: Okay. I'm not going to hold you to this,
10 but if you were to cull out those questions that we have
11 already covered and that Mr. Duke has already answered, you
12 cull those out, how much more questioning do you have of
13 Mr. Duke?

14 MR. DAVIS: I'm not sure. I'm trying to --

15 THE COURT: Why don't you cull them out. We will
16 come back, and we will see. You guys give me an estimate,
17 okay?

18 MR. DAVIS: I'm trying to shorten it down.

19 THE COURT: Okay. All right. We will take a break.

20 THE CLERK: All rise.

21 (Recess taken.)

22 THE CLERK: Recalling 12 CV 50324, DR Distributors,
23 LLC v. 21 Century Smoking, Inc.

24 THE COURT: All right. What's your best estimate?

25 MR. DAVIS: I'm going to need -- well, as you know,

1 from the length of our motion, the size of it, my best
2 estimate is two hours more.

3 THE COURT: I heard the "two hours," and then my
4 heart stopped. I didn't hear the second part. What?

5 MR. DAVIS: We have got a lot of other witnesses to
6 cover, so we are trying to sharpen the pencil, but I will -- I
7 don't want to say --

8 THE COURT: Two hours with Mr. Duke or two hours
9 total?

10 MR. DAVIS: Two hours with Mr. Duke, and then we are
11 going to move to Mr. Leavens.

12 THE COURT: Okay.

13 MR. DAVIS: Those are our primary witnesses.

14 We have our witness list, which we have submitted.

15 We intend to take as many of those witnesses we can. We are
16 covering what we think is the appropriate ground with
17 Mr. Duke.

18 THE COURT: Okay. All right. Let's continue with
19 the examination of Mr. Duke.

20 MR. DAVIS: Thank you.

21 BY MR. DAVIS:

22 Q. I'm going to turn your attention, Mr. Duke, to May and
23 June of this year, when your prior attorneys all withdrew from
24 the case.

25 Are you familiar with that?

1 A. Yes.

2 Q. And in connection with that, your prior attorneys filed a
3 motion with the court asking to stay the briefing or the
4 deadline to file a response to the motion that was pending,
5 and they also filed their motions to withdraw.

6 You are aware of all that?

7 A. Yes.

8 Q. And I got displayed on the screen here as Docket 298.
9 This was filed by your prior attorneys on May 30, 2019. This
10 is the motion to stay briefing schedule on motion for
11 sanctions.

12 Do you recognize this?

13 A. Yes.

14 Q. Okay. And did you review and approve the filing of this
15 motion?

16 A. No, I did not review this motion.

17 Q. You never reviewed it?

18 A. Could you scroll down a page?

19 Q. Sure.

20 A. If you are talking about what I think you are talking
21 about, no.

22 Q. Yes, sure.

23 A. No, of course not.

24 Q. And why do you say "of course not"?

25 A. No, I didn't review this. I don't know why I would review

1 this. But, no, I did not review this.

2 Q. Did your prior attorneys advise you they were filing this
3 motion before it was filed?

4 A. I don't remember. I do not believe so.

5 Q. Okay. And is it your testimony that the filing of this
6 motion was the first time you learned something from your
7 attorneys about the searching of your GoDaddy e-mail accounts,
8 that there was a problem with that?

9 MR. SALAM: Objection, your Honor. That wasn't his
10 testimony.

11 THE COURT: Well --

12 MR. SALAM: He has never even established when he
13 first found out about the GoDaddy.

14 THE COURT: Well, the question is "And is it your
15 testimony."

16 THE WITNESS: No, this is not the first time I found
17 out.

18 THE COURT: There you go.

19 BY MR. DAVIS:

20 Q. All right. When is the first time you discussed your
21 failure to search your entire GoDaddy e-mail account for
22 responsive documents in this case?

23 MR. SALAM: Object to the form of the question, your
24 Honor. There is no testimony saying "your failure." I object
25 to the form of the question.

1 MR. DAVIS: Shall I rephrase, your Honor?

2 THE COURT: Go ahead and rephrase.

3 BY MR. DAVIS:

4 Q. When was the first time you learned that your GoDaddy
5 e-mail accounts were not "subject" to the e-discovery search
6 process in this case or the ESI terms?

7 When is the first time you learned that from your
8 lawyers -- "prior lawyers," I should say?

9 A. I told my prior lawyers. They didn't tell me.

10 Q. Could you describe for me when that happened?

11 A. When we were meeting to prepare for the motion that they
12 were filing or counter -- I don't know, the thing replying to
13 whatever was filed by you guys.

14 I'm sorry. I don't know the terms. Whatever we were
15 working on, I was sitting on my computer, and that's when I
16 pulled up my GoDaddy account and discussed with them my belief
17 that certain things had not been searched.

18 THE COURT: All right. Thank you.

19 Are you done? I don't want to interrupt you.

20 THE WITNESS: Yes.

21 THE COURT: Let me pause for one second.

22 (Brief pause.)

23 THE COURT: Okay. Go ahead.

24 BY MR. DAVIS:

25 Q. Can you tell me who you were with when this occurred?

1 A. Peter Stamatis and Steve Shonder.

2 Q. And were there any other lawyers there with you?

3 A. No.

4 Q. And where were you?

5 A. In one of their offices. I'm not sure which one.

6 Q. And describe for me how you came to the realization that
7 your entire GoDaddy e-mails were not subject to the
8 e-discovery search terms?

9 A. I was speaking with them and loaded up my e-mails and
10 said -- not realizing kind of where this case was at at this
11 point. I had been searching for stuff all the time, so it was
12 just a question, "Should we be searching these ones as well?"

13 And they were like, "What do you mean? What do you
14 mean, should we be searching them?"

15 I said, "Well, I do not believe -- I am not sure, but
16 I do not think they have been searched," and they believed
17 they had been searched.

18 So we discussed, and that's where it went.

19 Q. And at that time, did Mr. Stamatis and Mr. Shonder share
20 with you the ESI search terms?

21 A. No.

22 Q. And when did you first learn about the ESI search terms in
23 this case?

24 A. Very recently.

25 Q. Very recently?

1 A. Yes.

2 Q. And what else do you recall about that meeting with
3 Mr. Stamatis and Mr. Shonder when you realized that your
4 GoDaddy e-mail account had not been searched for responsive
5 documents?

6 A. I mean, we were still preparing the response, so we were
7 still working. I would -- yes, we were still working on the
8 response. So we just kept working together on what we were
9 working on. They kind of looked into it a little bit more, I
10 believe, at that point.

11 Q. Do you know if they spoke to Tom Leavens or Travis Life
12 about it?

13 A. I do not know.

14 Q. Okay. And during the case, you had testified that you had
15 worked with your other attorneys, Tom Leavens, Heather
16 Liberman, Travis Life searching for e-mails, right?

17 A. Correct.

18 Q. And that included your Yahoo! and GoDaddy account, right?

19 A. Correct.

20 Q. Okay. And when you did that, you would run the searches
21 and select out the documents that resulted from the search
22 terms, right?

23 A. Exactly.

24 Q. And you would give them to your attorneys?

25 A. Yes.

1 Q. And you don't know what they did with them, but they
2 produced them in the case or didn't produce them, right?

3 A. Correct.

4 Q. Okay. And did your attorneys advise you of any obligation
5 in terms of disclosing to the court about this problem?

6 A. Peter Stamatidis, upon the realization of what had happened,
7 immediately, yes. He said as an agent of the court -- or I
8 don't know exactly what it is called, but he said something
9 like, "I need to let everyone know immediately."

10 Q. Okay. And as part of this process in this case, prior to
11 your realization about the GoDaddy account not being searched,
12 you had done searches and looked for e-mails, right?

13 A. A lot of them, yes.

14 Q. Okay. And had you searched that GoDaddy e-mail account
15 for the confused consumer e-mails?

16 A. Yes.

17 Q. Yes.

18 And you produced some, right?

19 A. Hundreds, yes.

20 Q. Yes.

21 THE COURT: Hold on. Now I'm confused.

22 My understanding of the "confused consumer," was that
23 Ms. Wood?

24 THE WITNESS: There is thousands. So there is many,
25 many e-mails. That's one of many, many hundreds.

1 THE COURT: So Ms. Wood is a subset of the world of
2 confused consumers?

3 THE WITNESS: Of a giant.

4 THE COURT: Understood. That clarifies it.

5 Go ahead.

6 I understand now.

7 MR. DAVIS: Thank you, your Honor.

8 BY MR. DAVIS:

9 Q. And you had searched previously for e-mails with Ms. Wood,
10 right, in your GoDaddy e-mail account, right?

11 A. I believe so, yes.

12 Q. Yes.

13 And you had never produced all of the e-mails that
14 you exchanged with Ms. Wood; isn't that right?

15 Do you understand that?

16 A. I do not recall it was produced.

17 THE COURT: Let's back this up.

18 Were there e-mail communications with Ms. Wood?

19 THE WITNESS: They have shown e-mail communications.

20 I would have to see the sent inbox thing because that would be
21 the same issue that I was having where e-mails were getting
22 deleted. I would need to see did she reply to me, when was
23 the reply, to be able to know what I would have and what I
24 wouldn't have.

25 THE COURT: Okay. So do you know if you communicated

1 with Ms. Wood via e-mail?

2 THE WITNESS: I have seen proof from them that, yes,
3 absolutely, we communicated with Ms. Wood via e-mail.

4 THE COURT: Okay. All right. I understand where you
5 are going. I apologize.

6 MR. DAVIS: I ask Plaintiff's Exhibit 69 be
7 displayed.

8 BY MR. DAVIS:

9 Q. What's in front of you is Plaintiff's Exhibit 69. It's
10 labeled DRSTCS numbers 5269 through 5274.

11 Have you seen this before?

12 A. In preparation for today, yes.

13 Q. All right. Before preparation for today, do you have an
14 independent recollection of ever seeing this before?

15 A. I recall it coming up in the past.

16 Q. Okay. And you have just testified you recall receiving
17 e-mails between yourself and a customer named Debra Wood?

18 A. Yes.

19 Q. And I will represent to you that this is a document that
20 the Plaintiff produced in this case, all the pages of it,
21 right?

22 You see at the top it is Debra Wood to
23 jeffpiper@CBDISTRIBUTORSinc.com?

24 A. Yes.

25 Q. We didn't get this from you or your company.

1 Do you understand?

2 A. Yes.

3 Q. Okay. And you said earlier today, in one of the documents
4 we saw, that you had trouble finding -- right, you searched,
5 but couldn't find some of the e-mails that you had found
6 before; is that right?

7 A. Correct.

8 Q. And you had searched previously, separate from that, for
9 e-mails with Ms. Wood?

10 A. I believe that someone had asked me to search for that
11 before.

12 Q. And that was your attorney Travis Life? We saw that
13 e-mail, right?

14 A. I believe prior to that, this had come up.

15 Q. And were you able to find any Ms. Wood e-mails at that
16 time?

17 A. There is thousands of these confused customers. I don't
18 recall this specific confused customer.

19 Q. But this one in particular, it's an exchange you had with
20 her back and forth, if we look at this entire e-mail string,
21 right?

22 It is she replied to you at least six times, and we
23 can go through it page by page, but --

24 A. And this is exactly what was happening and wasting all of
25 our time.

1 Q. Exactly.

2 A. That was the issue with the confusion because we were
3 wasting time replying to all these e-mails.

4 Q. And when we asked you to go back and look for these
5 e-mails, you couldn't find them all, right, in your e-mail
6 collection?

7 A. I don't recall. It could be misfiled. I don't know where
8 this e-mail is.

9 Q. But if she replied to you six times, those would be sent
10 to your inbox, right?

11 A. They should be in the support inbox.

12 Q. Right.

13 So you should be able to search your e-mail, and
14 these were to your GoDaddy support account, right?

15 A. As long as they were not misfiled, there is a 21st Century
16 confused customers folder.

17 Q. Okay.

18 A. So I can search that folder. But if it was misfiled
19 somehow into some other folder, I would have a hard time
20 finding it.

21 THE COURT: Can I pause you right there?

22 There is a 21st Century Smoking confused customer
23 folder?

24 THE WITNESS: In our e-mail. If we had a confused
25 customer, we just threw it in the folder.

1 THE COURT: Threw it in that folder.

2 Anybody copy that folder and produce it?

3 THE WITNESS: They have got it, yes. Every e-mail
4 that was in that folder we produced.

5 THE COURT: Okay. As the 21st Century Smoking
6 confused consumer folder, that folder was just simply copied
7 and given to the Plaintiffs?

8 THE WITNESS: I downloaded, saved every single e-mail
9 that was in that folder.

10 THE COURT: That was in that folder?

11 THE WITNESS: Yes.

12 THE COURT: Okay. So you didn't just have to copy
13 that folder. You copied individually each one?

14 THE WITNESS: It wasn't easy. Yes, you had to copy
15 every single one.

16 THE COURT: When did that happen?

17 THE WITNESS: In the very beginning of this case,
18 when showing that we were suffering from the confusion, we
19 presented the hundreds and hundreds of e-mails.

20 THE COURT: Okay. Well, Ms. Wood's e-mails from
21 2013, would that have happened? You said very early in the
22 case. The case is from 2012. Would her e-mail have been
23 produced in that process, if you know?

24 THE WITNESS: I am not sure.

25 THE COURT: Okay. Go ahead.

1 BY MR. DAVIS:

2 Q. Well, we know from that production that you did produce an
3 e-mail from Ms. Wood, right, as part of the string, but you
4 only produced one e-mail?

5 A. Okay. Yeah, I don't know.

6 Q. You don't know, independent of --

7 A. I believe what you are telling me, yes.

8 Q. Okay. Yes.

9 And my question is -- we have produced, because she
10 happened to forward the entire string of e-mails with you that
11 she had back in 2013 to our client, and we produced it in the
12 case because it hit the search terms, and we produced it,
13 right?

14 But my question for you is if she replied to
15 you -- and I have read the string several times -- six times
16 she wrote to you at your support@21centurysmoking.com, GoDaddy
17 e-mail account, if she writes to you, and it goes to your
18 inbox, it is not auto-purged, right?

19 A. In my inbox, it is not auto-purged.

20 Q. Say that one more time.

21 A. In my inbox, no, it is not auto-purged.

22 Q. That's right.

23 So when you apply your search terms, the ESI search
24 terms, or look for --

25 MR. SALAM: Objection, your Honor.

1 THE COURT: Let him finish the question. I don't
2 know how many times I have to say that.

3 BY MR. DAVIS:

4 Q. -- you should be able to retrieve all of the e-mails that
5 came to you from Ms. Wood, right?

6 THE COURT: Okay. If you have an objection, make it
7 now, and tell me what the objection is.

8 MR. SALAM: Objection, your Honor, foundation. He
9 has already -- he has already testified he didn't apply the
10 search terms. He has never seen the search terms.

11 THE COURT: That's why he had the word "if" in his
12 question.

13 Overruled.

14 THE WITNESS: Yes, obviously, I did not apply the
15 search terms because I had not seen the search terms, and I
16 didn't know which e-mail we presented, but I wouldn't -- if I
17 had a confused customer, I would have found one confused
18 e-mail and sent it. I wouldn't have sent six. That's
19 misleading. I wouldn't have sent seven e-mails from one
20 person and pretend that there was seven instances of
21 confusion. That is extremely misleading. So I would have
22 sent a chain of e-mails, to the best of my ability, for each
23 confused customer is what my goal would have been.

24 MR. DAVIS: Right.

25

1 BY MR. DAVIS:

2 Q. So your testimony, then -- and we know from your prior
3 e-mail with your prior attorney Mr. Life, he asked you to look
4 for the Ms. Wood e-mails, right?

5 A. Yes.

6 Q. You never produced them. Why not?

7 A. I couldn't find them. Like I said, it could be misfiled.
8 I don't know where it is, but I couldn't find it.

9 Q. But you couldn't find it?

10 A. Yes.

11 Q. And if they were sent to your inbox, you would have them,
12 right?

13 A. It would be -- it should be filed in the 21st Century
14 Smoke confusion folder. I couldn't find it in that folder.

15 Q. And did you search your entire Yahoo! e-mail account for
16 her e-mails?

17 A. My wife has probably 100 folders, and you can't -- or
18 maybe 200 folders, but you can't search -- I don't know how to
19 search all those folders at once. You have to individually go
20 into each folder. I don't have any clue where this got filed
21 away to. It is just not where it should be. I know that.

22 Q. Did you instruct your new ESI vendor to -- well, not your
23 new one, but 4Discovery took an image of all of your Yahoo!
24 e-mails earlier this year, right?

25 A. This isn't Yahoo! e-mail though.

1 Q. Right.

2 But your Yahoo! e-mail was imaged earlier this year,
3 right?

4 A. Yes.

5 Q. And now your GoDaddy e-mail account has been imaged most
6 recently by your new ESI vendor, right?

7 A. Correct.

8 Q. Have you asked them to search for the Ms. Wood e-mails?

9 A. You just told me it is going to come up with the search
10 terms. So they are going to use the 20 search terms, and then
11 this should come up, correct?

12 Q. I'm asking you if you have asked your new vendor to search
13 for the Ms. Wood e-mails.

14 A. I am not partaking in discovery. They are searching, and
15 they are going to do the terms. I'm not directing discovery
16 or directing ESI.

17 Q. And is it your testimony that you haven't directed the new
18 ESI vendor to address all the issues that have been raised in
19 the pending motion for sanctions, the reason why we are here,
20 you haven't given them any instructions from you to address
21 all the issues raised in that motion?

22 A. My lawyers have given instructions and my experts have
23 given instructions.

24 Q. But you haven't personally?

25 A. I have not personally given instructions to them, no.

1 Q. Mr. Duke, at the end of May, in the beginning of June, all
2 of your prior lawyers withdrew from their representation of
3 you and your company; is that right?

4 A. Correct.

5 Q. Okay. And did they tell you why they can no longer
6 represent you and your company in this case?

7 A. They said they were conflicted.

8 Q. All right. And when they said they were conflicted, did
9 they explain to you what the conflict was?

10 A. These errors that have been made in discovery.

11 Q. Okay. And what did they tell you about the errors made in
12 discovery?

13 A. We didn't have a lot of discussions. They were
14 withdrawing as my counsel. They weren't --

15 Q. I'm sorry. I can't hear you.

16 A. They were withdrawing as my counsel, so we didn't have a
17 lot of discussions about this.

18 Q. So they didn't -- when you say they didn't give you a lot
19 of discussion, what did they tell you specifically?

20 Like what did Mr. Leavens tell you specifically about
21 why he was conflicted with his continued representation of
22 you?

23 A. I don't even believe I discussed this with Mr. Leavens --

24 Q. You never --

25 A. -- prior to his withdraw.

1 Q. Did you have any conversation with him after his withdraw?

2 A. Other than where to be and when to be there, no.

3 Q. I can't understand what you are saying.

4 A. Other than like where to be and when to be there, no, an
5 e-mail, "Show up at court at this time."

6 Q. And when he said he was conflicted, how did he communicate
7 that to you?

8 A. As I just stated, I don't recall Leavens specifically
9 telling me that at all.

10 Q. Do you remember having a conversation with your prior
11 attorney Travis Life about why he withdrew from the case?

12 A. No.

13 Q. Did he e-mail you or communicate with you in any way why
14 he was withdrawing from the case?

15 A. I don't believe so.

16 Q. Okay. And did your prior attorney Mr. Peter Stamatis, did
17 he communicate to you why he was withdrawing from the case?

18 A. No.

19 Q. Did he -- when I say "communicate," did he write you an
20 e-mail and tell you why he was withdrawing?

21 A. I guess no one told me why they were withdrawing. They
22 all just simultaneously withdrew. I found out about the
23 conflicted thing, I guess, when I was in here in June. So I
24 don't think that anyone actually told me anything. They still
25 had been talking to me up to the day before, and then the next

1 day, they all withdrew.

2 Q. And is it your testimony that none of your prior attorneys
3 communicated anything in writing to you, outside of what they
4 said in court and filed in their papers, about what you have
5 just described as "errors" in this case?

6 A. At what time period?

7 Q. The time period from when they told you they were
8 withdrawing until we were standing in court.

9 A. I don't believe so.

10 Q. What about before that time period?

11 A. At which time period in particular are you talking about?

12 Q. I'm trying to understand if there came a point in time
13 when any of your prior attorneys communicated to you
14 specifically the errors they were raising with you that led to
15 the conflict, that led them to withdraw.

16 Do you understand what I'm saying?

17 A. Yes, way previous to all of this, sometime in 2018, this
18 was discussed.

19 Q. So in 2018 -- I want to make sure I understand -- your
20 attorneys discussed with you the errors in discovery in this
21 case that were going to conflict them out and lead them to
22 withdraw from the case in 2019?

23 A. No. In November of 2018, Tom Leavens came to San Diego,
24 and we met, and he had offered to withdraw as my counsel, and
25 it was because of the errors in discovery. That is what my

1 understanding was.

2 Q. When you say it was your understanding, did you get that
3 understanding from Mr. Leavens speaking to you or from some
4 other source?

5 A. From speaking to Mr. Leavens.

6 Q. All right. And when you say you got that understanding,
7 what did he tell you?

8 THE COURT: Now I'm going to ask for some foundation:
9 Where, when, who was present, who said what to who?

10 BY MR. DAVIS:

11 Q. Yes, I'm focusing in on the conversation you just
12 described. I believe it was in November of 2018, in
13 San Diego, with Tom Leavens; is that correct?

14 A. Correct.

15 Q. And was anyone else there with you?

16 A. No. Peter Stamatis was on the phone. He was still in
17 Chicago.

18 Q. And was this the first time -- let me go back.

19 Were you at home, at your house, with Mr. Leavens?

20 A. No.

21 Q. Where were you?

22 A. San Diego.

23 Q. In the city of San Diego.

24 Where in the city of San Diego?

25 A. Somewhere near the airport, maybe the Sheraton, I believe,

1 something like that.

2 Q. Was it in a conference room?

3 A. Yes.

4 Q. Okay. And did you know prior to that meeting what the
5 agenda on that meeting was when you were meeting with
6 Mr. Leavens?

7 A. I believe that we had some discussions. I had some
8 discussions with my attorneys. I don't quite recall where
9 they had gone, but I knew it was a very important meeting and
10 something had seemingly gone wrong.

11 Q. So prior to this November 2018 meeting, your prior
12 attorneys had communicated to you that there were problems or
13 errors in the case relating to discovery; is that right?

14 A. Yes, we had searched all of the Yahoo! e-mails in May of
15 2018, I believe. So at that point, we knew there was
16 problems.

17 Q. Got it. All right.

18 And did they, prior to your meeting -- prior to that
19 meeting in November of 2018, when was the first time any of
20 your prior attorneys raised with you an issue about an error
21 or problem with discovery, if you recall?

22 A. March to May of 2018 is when they figured out what was
23 going wrong, or at least partially what was going wrong.

24 THE COURT: And that related to the Yahoo! e-mails,
25 right?

1 THE WITNESS: Exactly, yes.

2 THE COURT: Did that include the Yahoo! chats, or
3 would that have been raised at that point?

4 THE WITNESS: I think you had already been dealing
5 with that here prior to that.

6 THE COURT: Okay. Thank you.

7 THE WITNESS: Yes.

8 BY MR. DAVIS:

9 Q. And was the first time that you discussed Mr. Leavens
10 withdrawing from the case at that November 2018 meeting?

11 A. I remember that being the topic of the meeting. I don't
12 remember if we had discussed it prior to the meeting.

13 Q. Do you remember getting any e-mails from your attorneys
14 regarding the errors and problems in discovery prior to that
15 November 2018 meeting?

16 A. May of 2018 is when we -- as I said, they were figuring
17 out what was going wrong with the Yahoo!.

18 Q. Other than figuring out what was going on, did they send
19 you e-mails detailing the error or problems that they had
20 identified and their concerns about it that may lead to them
21 withdrawing from the case?

22 A. As I said, only one attorney had discussed withdrawing
23 from the case. So that was Tom Leavens. That wasn't -- you
24 just said all of the attorneys discussed withdrawing. Only
25 one attorney had ever discussed with me withdrawing from the

1 case.

2 Q. And my question is: Prior to that meeting in November of
3 2018, did you know Mr. Leavens was going to propose to
4 withdraw from the case at that time?

5 A. As I previously stated, I can't remember the exact date
6 that I came to that realization. It was around that time. I
7 knew he was coming. I can't remember if I knew he was coming
8 for that reason. I believe that we had discussed it
9 beforehand, though.

10 THE COURT: Had he ever flown to San Diego to meet
11 with you before that?

12 THE WITNESS: No.

13 THE COURT: Okay. Go ahead.

14 BY MR. DAVIS:

15 Q. Did he come out there specifically just to meet with you
16 about the case?

17 A. I don't know what else he was doing in his life. I know
18 he came to San Diego specifically to meet with me. That's why
19 the meeting was by the airport.

20 Q. And did Mr. Leavens tell you anything about any action
21 that he or the other attorneys were taking on your behalf to
22 address the discovery issues?

23 A. I mean, I know we had searched the Yahoo! e-mails. Those
24 were being presented. I don't recall what other actions we
25 had discussed.

1 Q. Okay. Did they tell you they were hiring an ESI vendor or
2 an ESI expert to help with the problem?

3 A. I think that the ESI company did do the -- or the
4 4Discovery did do the search of the Yahoo! e-mails.

5 Q. And it was limited to just the Yahoo! e-mails, right?

6 A. I believe so, yes.

7 Q. All right. And this is -- the meeting is in November of
8 2018. Was there blame assigned at that meeting?

9 A. No.

10 Q. Okay. No one was saying whose fault it was or there was
11 an error that was caused by the attorneys or by you?

12 A. I mean, we all know it was unintentional, so there was
13 unintentional errors for sure. It was hard to lay blame for
14 something that wasn't on purpose.

15 Q. When you say "we all know that," who are you referring to?

16 A. I know it is unintentional, and Tom Leavens knows it is
17 unintentional. That is who was in the meeting. Peter
18 Stamatidis knows it is unintentional. Those were the three
19 people that were in the meeting.

20 Q. Right.

21 And that's what I'm trying to understand. If it is
22 unintentional, why is your attorney flying to San Diego to
23 tell you he was going to withdraw from the case because of the
24 errors and problems with discovery?

25 Do you know? Did he tell you?

1 MR. SALAM: Objection, your Honor.

2 THE COURT: Rephrase by saying "Did he tell you," and
3 then ask the question.

4 Sustained. Rephrase it.

5 BY MR. DAVIS:

6 Q. Did your attorney tell you why he was flying to San Diego
7 to tell you he may withdraw from the case because of discovery
8 problems?

9 MR. SALAM: Objection to the form.

10 THE COURT: I would overrule.

11 THE WITNESS: No, I don't know his mindset. I don't
12 know his mindset and how to answer it.

13 THE COURT: And that wasn't his mindset.

14 The question was -- that I told him to ask is "Did he
15 tell you?" That's a fairly innocuous question.

16 Did he say that before he flew out there?

17 THE WITNESS: And that's what I have been saying over
18 and over again. I can't remember if he told me right before,
19 if he told me there. I don't recall how it went down.

20 THE COURT: And I think you testified repeatedly you
21 kind of knew something was up, right?

22 THE WITNESS: Definitely knew something was up.

23 THE COURT: Okay. Go ahead, Mr. Davis.

24 BY MR. DAVIS:

25 Q. And you are saying everyone knew it was unintentional,

1 right? That's what your position is?

2 A. Yes.

3 Q. And so in June of this year, all six of your prior counsel
4 withdrew from the case, right?

5 A. Correct.

6 Q. And they all cited and said to this court and represented
7 that they have irreparable conflicts of interest with you.

8 Do you understand that?

9 A. Yes.

10 Q. And what are those conflicts?

11 THE COURT: If you know.

12 MR. DAVIS: If you know.

13 THE WITNESS: Continued discovery errors.

14 BY MR. DAVIS:

15 Q. Can you say that again? I can't understand what you are
16 saying.

17 A. Continued unintentional discovery mistakes.

18 Q. And are they assigning blame to you for all of these
19 mistakes?

20 A. I have never been told by any of them that I am to blame,
21 no.

22 Q. And is there anyone to blame in your opinion?

23 A. That's hard to say. I mean, if someone does something
24 unintentionally, I guess you can blame them, but it is hard to
25 assign blame when you know that no one did anything with any

1 intent.

2 Q. And your testimony, as you sit here today, is that all of
3 the things that we have covered today about the failure to
4 search the Yahoo!, failure to search GoDaddy, failure to
5 preserve your data, loss of your ESI data, all of those things
6 are unintentional errors; is that your position today?

7 A. Absolutely, yes.

8 THE COURT: Look at that, it is 5:15, which is the
9 name of a good Who song.

10 We are done.

11 Wednesday, the 30th, we have got you starting at
12 9:00 o'clock. We will see you then, okay?

13 MR. DAVIS: Thank you, your Honor.

14 THE WITNESS: Thank you, your Honor.

15 THE COURT: Have a good day.

16 (The hearing was adjourned to October 30, 2019, at
17 9:00 o'clock a.m.)

18 CERTIFICATE

19 I certify that the foregoing is a correct transcript from
20 the record of proceedings in the above-entitled matter.

21 /s/Heather M. Perkins-Reiva

November 4, 2019

22 _____
23 Heather M. Perkins-Reiva
Official Court Reporter

24 _____
25 Date